TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted]17

KENTUCKY FINANCE CORPORATION, PLAINTIFF IN ERROR,

vs.

PARAMOUNT AUTO EXCHANGE CORPORATION.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

FILED OCTOBER 21, 1922.

(27,947)

(27,947)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 590.

KENTUCKY FINANCE CORPORATION, PLAINTIFF IN ERROR,

vs.

PARAMOUNT AUTO EXCHANGE CORPORATION.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 5, 1921.

1 Supreme Court of the United States.

KENTUCKY FINANCE CORPORATION, Plaintiff in Error,

vs.

PARAMOUNT AUTO EXCHANGE CORPORATION, Defendant in Error.

The President of the United States to the Honorable Justices of the Supreme Court of the State of Wisconsin, Greeting:

Whereas in the record and proceeding and in the rendition of the judgment of the above entitled cause, which is now before you, or some of you, between Kentucky Finance Corporation, plaintiff and respondent, and C. H. Allen, defendant, and Paramount Auto Exchange Corporation, defendant and respondent, your court being the highest court of said state having jurisdiction of the cause, there was drawn in question the validity and constitutionality of Sections 4096 and 4097 of the Wisconsin Statutes of 1917 in that said sections of said Statutes denied due process of law to the plaintiff and appellant and were in conflict with and violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, all of which fully appears in the record and proceedings of the case and is specifically set forth in the assignment of errors on file herein; and

Whereas there is manifest error in said decision to the damage of Kentucky Finance Corporation, the petitioner in error;

And whereas we are willing that if there is error it should be duly corrected;

We command you, therefore, if judgment be given therein,
2 that you send, under seal of your court, the record and proceedings in said cause to the Supreme Court of the United States, together with this writ, within such time as may be necessary in order that you have the same at Washington on the 1st Monday of October, 1920, that the record may be then inspected by the Supreme Court of the United States, to be then and there held in order that justice may be done.

Witness, Hon. Edward D. White, Chief Justice of the Supreme Court of the United States, this 31st day of August, 1920.

[Seal U. S. District Court, Western Dist. of Wisconsin, Madison.]

F. W. OAKLEY,
Clerk of the District Court of the United States for the Western District of Wisconsin.
By FRED W. FRENCH,
Chief Deputy.

3 [Endorsed:] Supreme Court of the United States. Kentucky Finance Corporation, Plaintiff in Error, vs. Paramount

Auto Exchange Corporation, Defendant in Error. Writ of Error. Original. The within Writ allowed upon giving bond in the sum of $500.00 according to law. F. C. Eschweiler, Justice of the Supreme Court of the State of Wisconsin. Filed Aug. 31, 1920. Arthur A. McLeod, Clerk of Supreme Court, Wis. Bloodgood, Kemper & Bloodgood, 306-315 Mitchell Building, Milwaukee.

STATE OF WISCONSIN,
Supreme Court, ss:

The return to the within writ of appears by the schedule hereto annexed.

The return of the Justices of the Supreme Court of the State of Wisconsin.

[Seal of Supreme Court of Wisconsin.]

ARTHUR A. McLEOD,
Clerk of the Supreme Court, Wisconsin.

4 STATE OF WISCONSIN:

In Supreme Court.

No. 77.

KENTUCKY FINANCE CORPORATION, Plaintiff and Appellant,

vs.

C. H. ALLEN, Defendant; PARAMOUNT AUTO EXCHANGE CORPORATION, Defendant and Respondent.

To the Hon. Robert G. Siebecker, ex officio Chief Justice of the Supreme Court of the State of Wisconsin, and to the Associate Justices of said court:

The Kentucky Finance Corporation, the plaintiff and appellant in the above entitled cause, shows by this petition to this Honorable Court that in the record, proceedings and decisions in the Supreme Court of the State of Wisconsin, the same being the highest court of said state in which a decision could be had in this suit, a manifest error has occurred, greatly to the damage of said plaintiff and appellant.

That, as appears in the record and proceedings, there was drawn in question the validity and constitutionality of Sections 4096 and 4097 of the Wisconsin Statutes of 1917 in that said sections of said Statutes denied due process of law to this plaintiff and appellant and were in conflict with and violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, all of which fully appears in the record and proceedings of the case and is specifically set forth in the assignment of errors filed herewith.

Wherefore Petitioner prays that a writ of error be allowed and that a transcript of record, proceedings and papers upon which
5 said decree was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States, at Washington, D. C., under the rules of such court in such cases made and provided, to the end that the same may be, by said Honorable Court, inspected and corrected in accordance with law and justice.

BLOODGOOD, KEMPER & BLOODGOOD,
Solicitors and Counsel for Plaintiff and Appellant.

Dated, August 30, 1920.

6 [Endorsed:] State of Wisconsin, Supreme Court. No. 77. Kentucky Finance Corporation, Plaintiff and Appellant, vs. C. H. Allen, Defendant, Paramount Auto Exchange Corporation, Defendant and Respondent. Petition for Writ of Error. Original. Filed Aug. 31, 1920. Arthur A. McLeod, Clerk of Supreme Court, Wis. Bloodgood, Kemper & Bloodgood, 306-315 Mitchell Building, Milwaukee.

7 STATE OF WISCONSIN:

In Supreme Court.

KENTUCKY FINANCE CORPORATION, Plaintiff and Appellant,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, Defendants and Respondents.

Stipulated by and between the parties hereto, by their respective attorneys, that the application for a writ of error from the Supreme Court of the United States to the Supreme Court of Wisconsin for the purpose of reviewing the judgment in the above entitled action may be made forthwith without notice to or by either party, such notice being expressly waived, provided this application is timely.

Dated, Milwaukee, August 26, 1920.

BLOODGOOD, KEMPER & BLOODGOOD,
Attorneys for Plaintiff and Appellant.
DOERFLER, BENDER & McINTYRE,
Attorneys for Defendants and Respondents.

8 [Endorsed:] State of Wisconsin, Supreme Court. Kentucky Finance Corporation, plaintiff and appellant, vs. C. H. Allen and Paramount Auto Exchange, defendants and respondents. Stipulation. Original. Filed Aug. 31, 1920. Arthur A. McLeod, clerk of Supreme Court, Wis. Bloodgood, Kemper & Bloodgood, 306-315 Mitchell Building, Milwaukee.

9 & 10 STATE OF WISCONSIN:

In Supreme Court.

No. 77.

KENTUCKY FINANCE CORPORATION, Plaintiff in Error,

vs.

PARAMOUNT AUTO EXCHANGE CORPORATION, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

To Paramount Auto Exchange Corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the City of Washington, in the District of Columbia, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Wisconsin on the 31st day of August, 1920, wherein Kentucky Finance Corporation is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Robert G. Siebeeker, Associate Justice of the State of Wisconsin, this 21st day of September, in the year of our Lord one thousand nine hundred twenty (1920).

[Seal of the Supreme Court of Wisconsin.]

ROBERT G. SIEBEEKER,
Associate Justice of the Supreme Court of the State of Wisconsin.

11 [Endorsed:] State of Wisconsin, Supreme Court. Kentucky Finance Corporation, plaintiff in error, vs. Paramount Auto Exchange Corporation, defendant in error. Citation. Original. Filed Sep. 25, 1920. Arthur A. McLeod, clerk of Supreme Court, Wis. Due service of a copy of the within admitted this 23rd day of September, 1920. —— ——, atty. for deft. in error. Recd. Sept. 24, 1920. Doerfler, Bender & McIntyre, deft's. attys. Bloodgood, Kemper & Bloodgood, 306-315 Mitchell Building, Milwaukee.

11½ STATE OF WISCONSIN:

In Supreme Court.

No. 77.

KENTUCKY FINANCE CORPORATION, Plaintiff and Appellant,

vs.

C. H. ALLEN, Defendant; PARAMOUNT AUTO EXCHANGE CORPORATION, Defendant and Respondent.

Bond.

Know all men by these presents That Kentucky Finance Corporation, as Principal, and United States Fidelity & Guaranty Company, a corporation duly organized and existing under and by virtue of the laws of the state of Maryland with its principal office and place of business at the City of Baltimore in said state, and duly licensed to transact business as a surety company within the State of Wisconsin, are held and firmly bound unto Paramount Auto Exchange Corporation in the sum of five hundred dollars ($500.00), lawful money of the United States, to be paid to it and its successors and assigns, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and each of our successors and assigns, by these presents.

Sealed with our seals and dated this 30th day of August, A. D. 1920.

Whereas the above named Kentucky Finance Corporation has prosecuted a writ of error to the Supreme Court of the United States to inspect and correct the judgment of the Supreme Court of the State of Wisconsin in the above entitled matter.

12 Now therefore, the condition of this obligation is such that if the above named Kentucky Finance Corporation shall prosecute its said appeal to effect and answer all costs if it fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

KENTUCKY FINANCE CORPORATION,
By BLOODGOOD, KEMPER & BLOODGOOD,
Its Attorneys.

UNITED STATES FIDELITY & GUARANTY CO.,
By GEORGE HOFF, [SEAL.]
Its Attorney-in-Fact.

13 *General Power of Attorney.*

26157.

Know all men by these presents:

That the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, and having its principal office at the City of Baltimore, in the State of Maryland, does hereby constitute and appoint J. Tracy Hale, Jr., George Hoff, and J. E. Buck of the City of Milwaukee State of Wisconsin its true and lawful attorneys in and for the States of Wisconsin and Michigan for the following purposes, to wit:

To sign its name as surety to, and to execute, seal and acknowledge any and all bonds, and to respectively do and perform any and all acts and things set forth in the resolution of the Board of Directors of the said United States Fidelity and Guaranty Company, a certified copy of which is hereto annexed and made a part of this Power of Attorney; and the said United States Fidelity and Guaranty Company, through us, its Board of Directors, hereby ratifies and confirms all and whatsoever any one of the said J. Tracy Hale, Jr., and the said George Hoff and the said J. E. Buck may lawfully do in the premises by virtue of these presents.

In witness whereof, the said United States Fidelity and Guaranty Company has caused this instrument to be sealed with its corporate seal, duly attested by the signatures of its Vice-President and Assistant Secretary, this 5th day of June, A. D. 1920.

UNITED STATES FIDELITY AND GUARANTY COMPANY.

(Signed) By JOSEPH R. WILSON,
Vice-President.

(Signed) WM. M. PEGRAM,
[SEAL.] *Assistant Secretary.*

14 STATE OF MARYLAND,
Baltimore City, ss:

On this 5th day of June, A. D. 1920 before me personally came Joseph R. Wilson Vice-President of the United States Fidelity and Guaranty Company, and Wm. M. Pegram, Assistant Secretary of said Company, with both of whom I am personally acquainted, who being by me severally duly sworn, said that they resided in the City of Baltimore, Maryland; that they, the said Joseph R. Wilson and Wm. M. Pegram were respectively the Vice-President and Assistant Secretary of the said United States Fidelity and Guaranty Company, the corporation described in and which executed the foregoing Power of Attorney; that they each knew the seal of said corporation; that the seal affixed to said Power of Attorney was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that they signed their names thereto by like order

as Vice-President and Assistant Secretary, respectively, of the Company.

My commission expires the first Monday in May, A. D. 1922.

[SEAL.] (Signed) A. D. PATRICK,
Notary Public.

STATE OF MARYLAND,
Baltimore City, set:

I, Stephen C. Little, Clerk of Superior Court of Baltimore City, which Court is a Court of Record, and has a seal, do hereby certify that A. D. Patrick, Esquire, before whom the annexed affidavits were made, and who has thereto subscribed his name, was at the time of so doing a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments, or proof of deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Notary, and verily believe the signature to be his genuine signature.

In testimony whereof, I hereto set my hand and affix
15 the seal of the Superior Court of Baltimore City, the same being a Court of Record, this 5th day of June, A. D. 1920.

[SEAL.] (Signed) STEPHEN C. LITTLE,
Clerk of the Superior Court of Baltimore City.

Copy of Resolution.

That whereas, it is necessary for the effectual transaction of business that this Company appoint agents and attorneys with power and authority to act for it and in its name in States other than Maryland, and in the Territories of the United States and in the provinces of the Dominion of Canada and in the Colony of Newfoundland.

Therefore, be it resolved, that this Company do, and it hereby does, authorize and empower its President or either of its Vice-Presidents in conjunction with its Secretary or one of its Assistant Secretaries, under its corporate seal, to appoint any person or persons as attorney or attorneys-in-fact, or agent or agents of said Company, in its name and as its act, to execute and deliver any and all contracts guaranteeing the fidelity of persons holding positions of public or private trust, guaranteeing the performance of contracts other than insurance policies and executing or guaranteeing bonds and undertakings, required or permitted in all actions or proceedings, or by law allowed, and

Also in its name and as its attorney or attorneys-in-fact, or agent or agents to execute and guarantee the conditions of any and all bonds, recognizances, obligations, stipulations, undertakings or anything in the nature of either of the same, which are or may by law, municipal or otherwise, or by any Statute of the United States or of any State or Territory of the United States or of the Provinces of the Dominion of Canada or of the Colony of Newfoundland, or by the

rules, regulations, orders, customs, practice or discretion of
16 any board, body, organization, office or officer, local, municipal or otherwise, be allowed, required or permitted to be executed, made, taken, given, tendered, accepted, filed or recorded for the security or protection of, by or for any person or persons, corporation, body, office, interest, municipality or other association or organization whatsoever, in any and all capacities whatsoever, conditioned for the doing or not doing of anything or any conditions which may be provided for in any such bond, recognizance, obligation, stipulation, or undertaking, or anything in the nature of either of the same.

I, Wm. M. Pegram, Assistant Secretary of the United States Fidelity and Guaranty Company, hereby certify that at a regular meeting of the Board of Directors of said Company, duly called and held at the office of the Company, at the City of Baltimore, on the 11th day of July, A. D. 1910, at which was present a quorum of said Directors, duly authorized to act in the premises, resolutions were passed and entered on the minutes of said Company, of which resolutions the foregoing is a true copy and of the whole thereof.

In testimony whereof, I have hereunto set my hand and the seal of the United States Fidelity and Guaranty Company, this 5th day of June, A. D. 1920.

(Signed) WM. M. PEGRAM,
Assistant Secretary.

I, Wm. M. Pegram Assistant Secretary of the United States Fidelity and Guaranty Company, do hereby certify that the above and foregoing is a full, true and correct copy of the original power of attorney given by said Company to J. Tracy Hale, Jr., George Hoff and J. E. Buck, of Milwaukee, Wisconsin authorizing and empowering them to sign bonds as therein set forth, and do hereby further certify that the said power of attorney is still in full
17 force and effect.

Given under my hand and the seal of said Company, at Baltimore, Maryland, this 9th day of July, A. D. 1920.

[SEAL.] (Signed) WM. M. PEGRAM,
Assistant Secretary.

(Endorsements:) Certified copy. No. 26157. General power of attorney from United States Fidelity and Guaranty Company. To J. Tracy Hale, Jr., et al., Milwaukee, Wisconsin. 6-5-20.

18 [Endorsed:] State of Wisconsin, Supreme Court. Kentucky Finance Corporation, plaintiff and appellant, vs. C. H. Allen, defendant, Paramount Auto Exchange Corporation, defendant and respondent. Bond. Copy. The within bond approved as to manner, form and sufficiency. J. C. Eschweiller, Justice Supreme Court, Wis. Filed Aug. 31, 1920. Arthur A. McLeod, Clerk of Supreme Court, Wis. Bloodgood, Kemper & Bloodgood, 306-315 Mitchell Building, Milwaukee.

19 STATE OF WISCONSIN:

In Supreme Court.

No. 77.

KENTUCKY FINANCE CORPORATION, Plaintiff and Appellant,

vs.

C. H. ALLEN, Defendant; PARAMOUNT AUTO EXCHANGE CORPORATION, Defendant and Respondent.

Now comes the above named plaintiff and appellant, by Bloodgood, Kemper & Bloodgood, its attorneys, and excepts to the decision and judgment of this court heretofore rendered herein and to the whole and every part thereof, and particularly excepts,

First. For the reason that the court erred in sustaining the constitutionality of Sections 4096 and 4097 of the Statutes of Wisconsin in that said sections are in violation of the terms and provisions of the Fifth Amendment to the Constitution of the United States.

Second. For the reason that the court erred in sustaining the constitutionality of Sections 4096 and 4097 of the Statutes of Wisconsin in that said sections are in violation of the terms and provisions of the Fourteenth Amendment to the Constitution of the United States.

BLOODGOOD, KEMPER & BLOODGOOD,
Attorneys for Plaintiff and Appellant.

Dated, September 11, 1920.

20 [Endorsed:] State of Wisconsin, in Supreme Court. No. 77. Kentucky Finance Corporation, Plaintiff and Appellant, vs. C. H. Allen, Defendant, Paramount Auto Exchange Corporation, Defendant and Respondent. Assignment of Errors. Original. Filed Sep. 13, 1920. Arthur A. McLeod, clerk of Supreme Court, Wis. Bloodgood, Kemper & Bloodgood, 306-315 Mitchell Building, Milwaukee.

21 *Pleas Before the Supreme Court of the State of Wisconsin at a Term Thereof Begun and Held at the Capitol, in Madison, the Seat of Government of said State, on the Second Tuesday to-wit, the Thirteenth Day, of January, A. D.* 1920.

Present:

Hon. John B. Winslow,
Chief Justice;
Hon. Robert G. Siebecker,
Hon. James C. Kerwin,
Hon. Aad J. Vinje,
Hon. Marvin B. Rosenberry,
Hon. Franz C. Eschweiler,
Hon. Walter C. Owen,
Justices.

Arthur A. McLeod,
Clerk.

Be it remembered that heretofore, to-wit: on the fourth day of January in the year of our Lord One Thousand Nine Hundred and Nineteen came into the office of the Clerk of the Supreme Court of the State of Wisconsin, the Kentucky Finance Corporation, by its attorneys and filed in said Court its certain Notice of Appeal and Undertaking, according to the statute in such case made and provided, and also the Return to such appeal of the Clerk of the Circuit Court of Milwaukee County, in said State, in words and figures following, that is to say:

22 Filed Nov. 12, 1918. C. C. Maas, Clerk.

Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendant-.

To

Messrs. Doerfler, Greene, Bender & McIntyre, Attorneys for Defendant Paramount Auto Exchange, and

C. C. Maas, Esq., Clerk of the Aforesaid Court:

Please take notice That the plaintiff above named hereby appeals to the Supreme Court of the State of Wisconsin from the whole of that certain order made and entered in this action by said court on the 10th day of September, 1918, as amended by a certain order of said court dated October 12, 1918, copies of which orders are hereunto annexed, marked respectively Exhibits "A" and "B," and also from the whole of that certain order made and entered in this action by

said court on the 4th day of November, 1918, a copy of which order is hereunto annexed and marked Exhibit "C."

Yours, etc.,

BLOODGOOD, KEMPER & BLOODGOOD,
Attorneys for Plaintiff.

Dated, Milwaukee, November 4, 1918.

Filed Jan. 4, 1919.
ARTHUR A. McLEOD,
Clerk of Supreme Court, Wis.

23 EXHIBIT "A."

Filed Nov. 12, 1918. C. C. Maas, Clerk.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

versus

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendants.

Filed Jan. 4, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

An application having been duly made by the defendant, Paramount Auto Exchange, to the Court, for the examination of one T. E. Boswell, the Secretary of the plaintiff, a foreign corporation, under and pursuant to the provisions of Section 4096 of the Statutes of Wisconsin, for the examination of said T. E. Boswell, as such Secretary, before pleading:

And said matter having duly come on before the Court for hearing, before that branch thereof presided over by the Hon. W. J. Turner, Judge, on the 31st day of August, 1918:

And the plaintiff having appeared by Bloodgood, Kemper & Bloodgood, its attorneys; and the defendant, Paramount Auto Exchange, having appeared by Doerfler, Green, Bender & McIntyre, its attorneys; and the Court being duly and sufficiently advised in the premises;

It is now ordered: That the said T. E. Boswell, as Secretary of the said plaintiff, appear before W. J. McElroy, a Court Commissioner in and for Milwaukee County, Wisconsin, at his office, in the Loan and Trust Building, situated on the northwest corner of Grand Avenue and Second Street, in the city of Milwaukee, in the county of Milwaukee and state of Wisconsin, on the 24th day of Sep-
24 tember, 1918, at two (2) o'clock P. M. of that day, which time is hereby fixed by the Court as the time and place in this state

for such examination of said Boswell; and the said Boswell is hereby ordered and directed to attend at such time and place, and submit to such examination, and then and there have with him all papers, books, files, records, things and matters in his possession or under his control, of such plaintiff, by reason of his relation to such corporation, relevant to the controversy.

And it is hereby further ordered: That this order be served upon Bloodgood, Kemper & Bloodgood, attorneys of record for the said plaintiff, by delivering to and leaving with them a copy of this order at least five (5) days before the time set for hearing;

And it is further ordered: That the said defendant, Paramount Auto Exchange, on or before five (5) days before the time set for hearing, pay to said Bloodgood, Kemper & Bloodgood, attorneys for the plaintiff, the fare from the southern state line, to-wit, from Waukegan, Illinois, to Milwaukee, and return, and the sum of One & 50/100 Dollars ($1.50), witness fees for the attendance of said Boswell at such examination.

Dated, Milwaukee, September 10th, 1918.

By the Court,
W. J. TURNER,
Circuit Judge.

25 EXHIBIT "B."

Filed Nov. 12, 1918. C. C. Maas, Clerk.

Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendant-.

Filed Jan. 4, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

Stipulated by and between the parties hereto, by their respective attorneys, that the order heretofore made and entered herein requiring the Secretary of the above named plaintiff corporation to appear and submit to an examination under the provisions of Section 4096 of the Revised Statutes of Wisconsin may be amended by inserting therein the following words, that is to say: "And it further appearing that said plaintiff appeared in open court and for itself, and for its said Secretary, T. C. Boswell, consented that the said Boswell submit to an adverse examination pursuant to the terms and provisions of the Statute at the City of Louisville, Kentucky, which is the residence of said corporation and of said Boswell, before any officer and at any time which might be designated by the court;" and that said

order be further amended, so that the date for such examination shall be changed to October 23rd, 1918.

Dated, Milwaukee, October 12th, 1918.

BLOODGOOD, KEMPER & BLOODGOOD,
Plaintiff's Attorneys.

DOERFLER, GREEN & BENDER,
Defendants' Attorneys,
Paramount Auto Exchange.

Upon reading and filing the foregoing stipulation, and upon motion of Bloodgood, Kemper & Bloodgood, attorneys for the plaintiff,

It is ordered that the order heretofore made and entered herein, requiring T. E. Boswell, Secretary of the above named plaintiff, to appear before a Court Commissioner in Milwaukee County, Wisconsin, and submit to an examination under the provisions of Section 4096 of the Revised Statutes of the State of Wisconsin, be, and the same hereby is amended so as to include the following words, that is to say: "And it further appearing that said plaintiff appeared
26 in open Court and for itself, and for its said Secretary, T. E. Boswell, consented that the said Boswell submit to an adverse examination pursuant to the terms and provisions of the Statute at the City of Louisville, Kentucky, which is the residence of said corporation and of said Boswell, before any officers and at any time which might be designated by the Court;" and that the date for such examination shall be changed to October 23rd, 1918, otherwise same time and place.

Dated, Milwaukee, October 12th, 1918.

By the court.

W. J. TURNER,
Circuit Judge.

27 EXHIBIT "C."

Filed Nov. 12, 1918. C. C. Maas, Clerk.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

versus

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendants.

Filed Jan. 4, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

The order to show cause herein, of the defendant, Paramount Auto Exchange, dated the 31st day of October, 1918, requiring the plaintiff to show cause before said Court, before the Hon. W. J. Turner,

Judge presiding, why the plaintiff's complaint herein should not be dismissed, with costs, and said complaint stricken from the records, for the reason that one T. E. Boswell, the Secretary of the plaintiff, did not appear before the Hon. W. J. McElroy, a Court Commissioner in and for Milwaukee County, Wisconsin, at the office of said Commissioner, on the 23d day of October, 1918, at two (2) o'clock P. M. of that day, and submit to an examination under and pursuant to the provisions of Section 4096 of the Statutes of Wisconsin, and the acts amendatory thereof, for an adverse examination of the said Boswell, as such Secretary of the plaintiff;

And said matter having duly come on for a hearing before said Court, before the Hon. W. J. Turner, Judge; and the defendant, Paramount Auto Exchange, appearing by Doerfler, Green, Bender & McIntyre, its attorneys, and the plaintiff appearing by Bloodgood, Kemper & Bloodgood, its attorneys, said plaintiff appearing in opposition to the application of the said defendant, Paramount
28 Auto Exchange;

And it appearing to the satisfaction of the Court that all of the conditions to be performed by the defendant, Paramount Auto Exchange, have been duly complied with, in accordance with the terms of the original order and the amended order of the Court herein made and served; and that the said T. E. Boswell, the Secretary of the plaintiff corporation, failed, neglected and refused to appear for such adverse examination before said Court Commissioner at the time and place stated in the Court's order and amended order;

Now therefore, on motion of Doerfler, Green, Bender & McIntyre, attorneys for the defendant, Paramount Auto Exchange,

It is ordered: That the plaintiff's complaint be, and the same hereby is, stricken from the files, and the plaintiff's cause of action dismissed, with costs.

Dated, Milwaukee, November 4, 1918.

By the court.

W. J. TURNER,
Circuit Judge.

29 (Endorsements:) 52777. Circuit Court, Milwaukee County. Kentucky Finance Corporation, Inc., Plaintiff, vs. C. H. Allen and Paramount Auto Exchange, a corporation, Defendants. Notice of Appeal to Supreme Court. Recd. copy Nov. 12, 1918. Doerfler, Green, Bender & McIntyre, Attys. for Paramount Auto Ex. Due service of a copy of within admitted this 12th day of November, 1918. C. C. Maas, Clerk of Circuit Court. Filed Nov. 12, 1918. C. C. Maas, Clerk. Filed Jan. 4, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis. Bloodgood, Kemper & Bloodgood, 306-315 Mitchell Building, Milwaukee.

30 Filed Nov. 12, 1918. C. C. Maas, Clerk.

Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendant.

Filed Jan. 4, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

Whereas certain orders have been made in the above entitled action requiring among other things that T. E. Boswell, Secretary of the above named plaintiff, appear before a Court Commissioner at Milwaukee, Wisconsin, for the purpose of submitting to an adverse examination under the provisions of Section 4096 of the Revised Statutes of Wisconsin, and further, dismissing the complaint of the plaintiff herein on account of the failure of said T. E. Boswell, Secretary as aforesaid, to so appear and testify, from which orders the plaintiff has duly given notice of appeal.

Now therefore, National Surety Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York and licensed to transact business as a surety company within the State of Wisconsin, does hereby undertake, in the sum of two hundred fifty dollars ($250.00), that if the said orders appealed from, or any part thereof, be affirmed the appellant will pay all costs and damages which may be awarded against it upon said appeal.

Dated, Milwaukee, Wisconsin, November 12th, 1918.

NATIONAL SURETY COMPANY, [SEAL.]
By BIRT S. LINANN,
Resident Vice-President.

Attest:
E. FRANKENSTEIN,
Resident Asst. Secretary.

31 (Endorsements:) 52777. Circuit Court, Milwaukee County. Kentucky Finance Corporation, Inc., Plaintiff, vs. C. H. Allen and Paramount Auto Exchange, a Corporation, Defendants. Undertaking on Appeal. Recd. copy Nov. 12, 1918. Original. Doerfler, Green, Bender & McIntyre, Attys. for Paramount Auto Ex. Filed Nov. 12, 1918. C. C. Maas, Clerk. Filed Jan. 4, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis. Bloodgood, Kemper & Bloodgoood, 306-315 Mitchell Building, Milwaukee.

32 Filed 5. Jul. 24, 1918. 5. C. C. Maas, Clerk.

STATE OF WISCONSIN,
Milwaukee County, ss:

I certify that by virtue of the within affidavit in replevin on the 12th day of July, 1918, at the City of Milwaukee, County of Milwaukee, State of Wisconsin, I seized one Haynes Touring Automobile, 1918 model 39, factory No. 31524, the property described therein.

I further certify that on the 16th day of July, in compliance with the endorsement on the within affidavit in replevin, I delivered the within described property to the within named plaintiff.

I further certify that on the 12th day of July, 1918, I served the within summons, undertaking and affidavit of replevin on the therein named Paramount Auto Exchange, a corporation, defendant, by delivering the same to Isadore Epstein, its president, and leaving with him, personally, a true copy thereof.

I endorsed my name official title and date of service on said copy.

I further certify that after due and diligent search and inquiry the therein named defendant, C. H. Allen, cannot be found within my county and from information and belief which information I believed to be true he is not now a resident of this county and State of Wisconsin.

Dated this 20th day of July, 1918.

PATRICK McMANUS,
Sheriff,
Per WM. KELLY,
Deputy Sheriff.

Service	1.00
Travel	.20
Expense	2.00
	3.20

Filed Jan. 4, 1919.
ARTHUR A. McLEOD,
Clerk of Supreme Court, Wis.

33 Filed Jul. 23, 1918. C. C. Maas, Clerk.

Docket No. —, C. B. —, Page —.

STATE OF WISCONSIN,
Milwaukee County, ss:

I hereby certify that on the 12th day of July, 1918, at the City of Milwaukee, in said County of Milwaukee, I duly served the within Summons, Undertaking & affidavit of replevin on the within named Paramount Auto Exchange, a Corpr., Defendant, by reading the

same to Isadore Epstein, Pres. and delivering to and leaving with him, personally, a true copy thereof and I endorsed my name, official title and date of service on said copy.

I hereby certify that after due and diligent search and inquiry the within named Defendant C. H. Allen cannot be found within my County, and from information and belief which information I believe to be true,—he is is not now a resident of this County and State of Wisconsin.

Dated July 12th, 1918, at — M.

PATRICK McMANUS,
Sheriff,

Per WM. KELLY,
Deputy Sheriff.

Service	$1.00
Travel	.20
Expense	2.00

Filed Jan. 4, 1919.
ARTHUR A. McLEOD,
Clerk of Supreme Court, Wis.

34 Filed Jul. 23, 1918. C. C. Maas, Clerk.

Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendants.

STATE OF WISCONSIN,
Milwaukee County, ss:

T. E. Boswell, being first duly sworn, on oath says that he is a resident of the City of Louisville, State of Kentucky, and that he is the secretary of the plaintiff in the above entitled action, makes this affidavit upon its behalf, and is duly authorized so to do.

That said plaintiff is a corporation duly organized and existing under any by virtue of the laws of the State of Kentucky, with its principal office and place of business at the City of Louisville, in said state; that said plaintiff is the owner of and lawfully entitled to the possession of the following described property, to-wit: One (1) Haynes touring automobile 1918, model 39, Factory No. 31524; that said property is wrongfully detained by C. H. Allen, the defendant, at the garage of Paramount Auto Exchange, 142 Eighth street in the City and County of Milwaukee; that the alleged cause of such detention is not known to this affiant.

That said property has not been taken for any tax, assessment or fine pursuant to any statute of this state, nor seized under an execu-

tion or attachment against the property of the said plaintiff, and that the actual value of said property is one thousand three hundred forty-one dollars ($1,341.00).

T. E. BOSWELL.

Subscribed and sworn to before me this 12th day of July, A. D. 1918.

C. RODERMUND,
Notary Public, Milwaukee County, Wisconsin.

Filed Jan. 4, 1919, 1919.

ARTHUR A. McLEOD,
Clerk of Supreme Court, Wis.

35 Filed Jul. 23, 1918. C. C. Maas, Clerk.

Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendants.

The State of Wisconsin to the said defendants and each of them:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint.

BLOODGOOD, KEMPER & BLOODGOOD,
Plaintiff's Attorneys.

P. O. Address 307-315 Mitchell Bldg., Milwaukee, Milwaukee Co., Wis.

Filed Jan. 4, 1919.

ARTHUR A. McLEOD,
Clerk of Supreme Court, Wis.

(Endorsements:) Circuit Court, Milwaukee County. Kentucky Finance Corporation, Inc., Plaintiff, vs. C. H. Allen and Paramount Auto Exchange, Defendants. Summons. Docket No. 27951. Patrick McManus, Sheriff. Bloodgood, Kemper & Bloodgood, Attorneys and Counselors at Law, 307-315 Mitchell Bldg., Milwuakee, Wis.

36 Filed Jul. 23, 1918. C. C. Maas, Clerk.

THE STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendants.

Whereas, an affidavit has been made by T. E. Boswell, Secretary of Kentucky Finance Corporation, Ind., plaintiff in this action, that the plaintiff Kentucky Finance Corporation, Inc., is the owner of, and lawfully entitled to the possession of certain personal property, to wit: One (1) Haynes Touring Automobile 1918, Model 39, Factory No. 31524; that the said property is wrongfully detained by the above named defendant, and that the alleged cause of detention is not known to said affiant; that the said property has not been taken for any tax, assessment or fine, pursuant to the statute, or seized under any execution or attachment against the property of the plaintiff and that the actual value of said property is One thousand, three hundred forty-one *dollars* ($1,341.00) Dollars.

And whereas, the plaintiff claim- the immediate delivery to it of said property, and has required the sheriff of said county to take the said property from the said defendant and deliver the same to the said plaintiff;

Now, therefore, in consideration of the taking of said property, or any part thereof, by the sheriff of Milwaukee county aforesaid, by virtue of the said affidavit and the requisition thereupon endorsed, the undersigned, National Surety Company, a New York corporation duly licensed to transact business in the State of Wisconsin, does hereby undertake and bind itself, its successors and assigns, to the said defendant in the sum of Twenty-seven hundred dollars ($2,700.00) for the prosecution of this action, for the return of said property to the said defendant if return thereof shall be adjudged, and for the payment to him the said defendant of such sum as may for any cause be recovered against the plaintiff in this action.

Dated the 12th day of July, A. D. 1918.

NATIONAL SURETY COMPANY.
JOHN McHUHNEY,
Resident Vice-President.

Attest:
E. FRANKENSTEIN,
[SEAL.] *Resident Asst. Secretary.*

Filed Jan. 4, 1919.
ARTHUR A. McLEOD,
Clerk of Supreme Court, Wis.

37 (Endorsements:) Original. Circuit Court, Milwaukee County. Kentucky Finance Corporation, Inc., vs. C. H. Allen et al. Docket No. 27951. Patrick McManus, Sheriff. Undertaking for Plaintiff. I approve of the within Undertaking, both as to form and the sufficiency of the sureties therein. Dated the 12th day of July, A. D. 1918. Patrick McManus, Buchn Sheriff of Milwaukee Co.

38 (Endorsements:) 52777. Circuit Court, Milwaukee County. Kentucky Finance Corporation, Inc., Plaintiff, vs. C. H. Allen et al., Defendants. Affidavit in Replevin. Docket No. 27951. Patrick McManus, Sheriff. Pd. 3.00. Original. Filed Jul. 23, 1918. C. C. Maas, Clerk. Filed Jan. 4, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis. State of Wisconsin to Sheriff Milwaukee County: You are hereby required to take from C. H. Allen, the defendant, the property described in the within affidavit and deliver it to the plaintiff, Kentucky Finance Corporation, Inc. Dated, July 12, 1918. Bloodgood, Kemper & Bloodgood, Plaintiff's Attorneys. Bloodgood, Kemper & Bloodgood, 306-315 Mitchell Bldg., Milwaukee, Wis.

39 Filed 5. Jul. 24, 1918. 5 C. C. Maas, Clerk.

STATE OF WISCONSIN,
Circuit Court, Milwaukee County:

KENTUCKY FINANCE CORPORATION, Plaintiff,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendants.

(Subd. 1, Sec. 2639; Smith v. Grady, 68 Wis., 215; Witt v. Meyer, 69 Wis., 595; Bragg v. Gaynor, 85 Wis., 468; Pennoyer v. Neff, 95 U. S., 714.)

STATE OF WISCONSIN,
Milwaukee County, ss:

Aug. C. Moeller being duly sworn, states as follows: Deponent is one of the attorneys for the plaintiff, and makes this affidavit on its behalf and is duly authorized so to do. A summons has been issued in the above entitled action, and said action has been commenced, and is now pending, the complaint herein is duly verified, and has been filed by and in the office of the clerk of said court.

That a cause of action exists in favor of the plaintiff, and against the defendant C. H. Allen and Paramount Auto Exchange which fully stated in said complaint, the grounds of which are as follows: the wrongful detention of a Haynes automobile.

The said defendant C. H. Allen is not a resident of this state,

and the plaintiff is unable, with due diligence, to make service of the summons herein upon said defendant C. H. Allen; that the said defendant C. H. Allen cannot be found within the State of Wisconsin, although diligent effort to find him and serve said summons upon him has been made.

The residence of the defendant C. H. Allen is unknown to the plaintiff, and the plaintiff is unable to ascertain either the postoffice address or the residence of said defendant, although the plaintiff has made diligent effort to ascertain them, and said defendant cannot be found within the State of Wisconsin, although diligent effort to find him and serve the said summons upon him has been made.

The said defendant C. H. Allen has property within the State of Wisconsin, which is subject to the process of said court, and which is described as follows, to wit: One Haynes Touring Automobile 1918, Model 39, Factory No. 31524.

AUG. C. MOELLER.

Subscribed and sworn to before me, this 16th day of July, A. D. 1918.

ELLEN M. McDONALD,
Notary Public, Milwaukee Co., Wis.

Filed Jan. 4, 1919.
ARTHUR A. McLEOD,
Clerk of Supreme Court, Wis.

40 (Endorsements:) 52777. State of Wisconsin, Circuit Court, Milwaukee County. Kentucky Finance Corporation, vs. C. H. Allen and Paramount Auto Exchange, Deft. Affidavit for Order of Publication. Non-resident or unknown having property in this state. Filed Jul. 24, 1918. C. C. Maas, Clerk. Filed Jan. 4, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

41 Filed 5. Jul. 24, 1918. 5. C. C. Maas, Clerk.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION

vs.

C. H. ALLEN & PARAMOUNT AUTO EXCHANGE, Defendant.

(Sec. 2640, Smith v. Grady, 68 Wis. 215; Witt v. Meyer, 69 Wis. 595; Bragg v. Gaynor, 85 Wis. 468; Pennoyer v. Neff, 95 U. S., 714.)

Upon the Record in the above entitled action, and all papers, process and pleadings served or filed herein, and upon the complaint duly verified and filed, and the affidavit of August C. Moeller said complaint and affidavit showing, and it appearing to my satisfac-

tion, that said action has been commenced, summons issued therein, that the action is now pending, that the complaint is duly verified, and has been filed with the clerk of said court; that a cause of action exists in favor of the plaintiff and against the defendants C. H. Allen and Paramount Auto Exchange, the ground- which are as follows: retention of a Haynes Automobile; that said defendant C. H. Allen is not a resident of the State of Wisconsin, and that the plaintiff is unable, with due diligence, to make service of said summons upon the said defendant C. H. Allen; that the said defendant C. H. Allen cannot be found with the State of Wisconsin, although diligent effort to find him and serve said summons upon him has been made; that the post-office address of the defendant is unknown; that the residence of the defendant C. H. Allen is unknown to the plaintiff, and the plaintiff is unable to ascertain either the post-office or the residence of said defendant, and that the plaintiff has made diligent effort to ascertain them, and said defendant cannot be found within the State of Wisconsin, although diligent effort to find him and serve the said summons upon him has been made; that the said defendant C. H. Allen has property within the State of Wisconsin, which is subject to the process of said court, and which is described as follows, to-wit: One Haynes Automobile.

Therefore, on motion of Bloodgood, Kemper & Bloodgood, attorneys for the plaintiff,

It is hereby Ordered, That service of the summons in said action upon the said defendant C. H. Allen be made by publication of the said summons in the Daily Reporter a newspaper published in the City of Milwaukee, county of Milwaukee and State of Wisconsin, which said newspaper is hereby designed as most likely to give notice to the said defendant once a week for six weeks, and that the first publication of said summons be made within three months from the date of this order; and the deposit of a copy of said summons and affidavit of replevin in a specified post-office, so enclosed and postage prepaid, may be omitted, for the reason that the plaintiff is unable, after due diligence, to ascertain either the post-office address or the residence of the said defendant, and after having made diligent effort to ascertain the same.

It is hereby further Ordered, That at the option of the said plaintiff a copy of said summons and a copy of said affidavit of replevin be delivered to the said defendant C. H. Allen personally, without the State of Wisconsin, and that when said copy of the summons, and said copy of the affidavit of replevin have been so delivered to the said defendant such delivery shall have the same effect as the complete publication of said summons, and the mailing of said summons and affidavit of replevin hereinbefore provided for, would have had.

W. J. TURNER,
Circuit Judge.

Dated July 24, A. D. 1918.

Filed Jan. 4, 1919.
ARTHUR A. McLEOD,
Clerk of Supreme Court, Wis.

42 (Endorsements:) 52777. Circuit Court, Milwaukee County. Kentucky Finance Corp., vs. C. H. Allen & Paramount Auto Exchange, Defts. Order of Publication. Non-resident or unknown. Property in this State. Filed Jul. 24, 1918. C. C. Maas, Clerk. Filed Jan. 4, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

43 Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

vs.

C. H. ALLEN et al., Defendants.

STATE OF WISCONSIN,
Milwaukee County, ss:

Albion Nolte being first duly sworn, on oath says that he is the foreman of the printers of The Daily Reporter, which is a public newspaper of general circulation, printed and published in the English language in the city of Milwaukee, in said county, and fully complying with the laws of Wisconsin relating to the publication of legal notices; that the notice of which the printed one attached is a true copy, which copy was taken from said newspaper as published, was published in said newspaper once a week for six (6) successive weeks, the date of the first publication being the thirty-first (31st) day of July, A. D. 1918, and the date of the last publication being the fourth (4) day of September, A. D. 1918.

ALBION NOLTE.

Subscribed and sworn to before me this twelfth (12th) day of September, A. D. 1918.

[SEAL.] J. F. WOODMANSEE,
Notary Public, Milwaukee County, Wisconsin.

My commission expires January 9th, 1921.

Summons.

Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendants.

The State of Wisconsin to the said defendants and each of them:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend

the above entitled action in the court aforesaid, and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint.

BLOODGOOD, KEMPER & BLOODGOOD,
Plaintiff's Attorneys.

P. O. Address: 307-315 Mitchell Bldg., Milwaukee, Milwaukee Co., Wis.

7-31-6W.

44 (Endorsement:) 52777. Circuit Court, Milwaukee County. Kentucky Finance Corporation, Inc., Plaintiff, vs. C. H. Allen, et al., Defendants. Proof of Publication. Summons. Bloodgood, Kemper & Bloodgood. Received Sep. 19, 1918. Refd. to —— ——. Ansd. —. Filed Sep. 26, 1918. C. C. Maas, Clerk. Filed Jan. 4, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis. Bloodgood, Kemper & Bloodgood, Plaintiff's Attorneys.

45 Filed Jul. 24, 1918. C. C. Maas, Clerk.

Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendants.

Filed Jan. 4, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

To Bloodgood, Kemper & Bloodgood,
Attorneys for Plaintiff:

You will please take notice: That the above named defendant, Paramount Auto Exchange, does hereby move the court, upon the records, proceedings and files herein, and upon the affidavit of Christian Doerfler, served herewith, for an order fixing the time and place in this state for the examination of one T. E. Boswell, the secretary of the plaintiff, and who was such secretary at the time the matters referred to in the plaintiff's complaint herein transpired; and that said order also direct that the said Boswell, as such secretary, bring with him at the time and place of such hearing, all papers, books, files, records and things and matters in his possession as such secretary, or under his control, pertaining to the matters relevant to the controversy herein; that this application is made under and pursuant to the provisions of Subdivision 7 of Section 4096 of the Statutes of the State of Wisconsin, and the acts amendatory thereof.

46 And you will please take notice: That such motion will be brought on for hearing on the 31st day of August, 1918, at ten (10) o'clock a. m., before that branch of said court presided over by the Hon. W. J. Turner, judge presiding, at the court room of said Judge Turner, in the Masonic building, situated on the south-east corner of Oneida and Jefferson streets, in the City of Milwaukee, Milwaukee County, Wisconsin.

Dated, Milwaukee, August 23, 1918.

DOERFLER, GREEN, BENDER & McINTYRE,
Attorneys for Defendant, Paramount Auto Exchange, a Corporation.

47 Filed Jul. 24, 1918. C. C. Maas, Clerk.

Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendants.

Filed Jan. 4, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN,
Milwaukee County, ss:

Christian Doerfler, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the above named defendant, Paramount Auto Exchange, a Wisconsin corporation;

That upon information and belief, deponent alleges that the plaintiff, Kentucky Finance Corporation, Inc., is a foreign corporation, organized and existing under and pursuant to the laws of the State of Kentucky, and not authorized as such foreign corporation, to do business within the State of Wisconsin;

That one T. E. Boswell at all times mentioned and referred to in the complaint herein, was and now is the secretary of the said plaintiff, and as such secretary, has in his possession all the records, files and documents pertaining to the allegations referred to in the complaint herein; that in order to enable the said defendant, Paramount Auto Exchange, to plead herein, it will be necessary for such defendant to examine the said T. E. Boswell, who resides in Kentucky, the secretary of the said plaintiff;

48 Deponent therefore prays that under and pursuant to the provisions of Paragraph 7 of Section 4096 of the Statutes of Wisconsin, an order may be made herein by the court, fixing the time and place in this state for the examination of said Boswell,

the secretary of the said plaintiff; and that the court also order that the said Boswell bring with him, at the time and place of such examination, all papers, books, files, records and things in the possession of the said plaintiff, and also in his possession as such secretary, by reason of his relation as secretary to such corporation, which are relevant to the controversy.

CHRISTIAN DOERFLER.

Subscribed and sworn to before me this 23rd day of August, 1918.

JENNIE L. BURKE,
Notary Public, Milwaukee County.

49 (Endorsements:) 52777. Original. State of Wisconsin. Circuit Court, Milwaukee County. Kentucky Finance Corporation, Inc., Plaintiff, vs. C. H. Allen and Paramount Auto Exchange, a Corporation, Defendants. Affidavit and Notice. Doerfler, Green, Bender & McIntyre. Formerly Doerfler, Green & Bender, 1312 First National Bank Bldg., Milwaukee, Wisconsin, Attorneys for def't Paramount Auto Ex. Due service admitted this 23rd day of August, 1918. Bloodgood, Kemper & Bloodgood, Attorneys for plaintiff. Filed Jul. 24, 1918. C. C. Maas, Clerk. Filed Jan. 4, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

50 Filed Sep. 13, 1918. C. C. Maas, Clerk.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendants.

STATE OF WISCONSIN,
Milwaukee County, ss:

Arthur Snapper, being first duly sworn, on oath deposes and says that he is, and was at all times hereinafter mentioned, a citizen of the State of Wisconsin, and not a party to this action; that he served the within order on Bloodgood, Kemper & Bloodgood, known by him to be the attorneys for the plaintiff, on the 11th day of September, 1918, by delivering to and leaving with Wheeler P. Bloodgood, known by affiant to be a member of said firm, a true copy of said order, and by then and there exhibiting to him the original order and pointing out the signature of the judge thereon; and that at the time he made said service he tendered to the said Wheeler P. Bloodgood, the sum of Four and 74/100 Dollars ($4.74) in legal tender of the United States.

ARTHUR SNAPPER.

Subscribed and sworn to before me this 11th day of September, 1918.

JENNIE L. BURKE,
Notary Public in and for
Milwaukee County, Wisconsin.

Filed Jan. 4, 1919.
ARTHUR A. McLEOD,
Clerk of Supreme Court, Wis.

51 Filed Sep. 13, 1918. C. C. Maas, Clerk.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendants.

Filed Jan. 4, 1919. Arthur A. Mcleod, Clerk of Supreme Court, Wis.

An application having been duly made by the defendant, Paramount Auto Exchange, to the court, for the examination of one T. E. Boswell, the secretary of the plaintiff, a foreign corporation, under and pursuant to the provisions of Section 4096 of the Statutes of Wisconsin, for the examination of said T. E. Boswell, as such secretary, before pleading;

And said matter having duly come on before the court for hearing, before that branch thereof presided over by the Hon. W. J. Turner, judge, on the 31st day of August, 1918;

And the plaintiff having appeared by Bloodgood, Kemper & Bloodgood, its attorneys; and the defendant, Paramount Auto Exchange, having appeared by Doerfler, Green, Bender & McIntyre, its attorneys; and the court being duly and sufficiently advised in the premises;

It is now ordered: That the said T. E. Boswell, as secretary of the said plaintiff, appear before W. J. McElroy, a Court Commissioner in and for Milwaukee County, Wisconsin, at his office, in the Loan and Trust Building, situated on the northwest corner of Grand avenue and Second street, in the City of Milwaukee, in the County of Milwaukee and State of Wisconsin, on the 24th day of
52 September, 1918, at two (2) o'clock p. m. of that day, which time is hereby fixed by the court as the time and place in this state for such examination of said Boswell; and the said Boswell is hereby ordered and directed to attend at such time and place, and submit to such examination, and then and there have with him all papers, books, files, records, things and matters in his possession or

under his control, of such plaintiff, by reason of his relation to such corporation, relevant to the controversy.

And it is hereby further ordered: That this order be served upon Bloodgood, Kemper & Bloodgood, attorneys of record for the said plaintiff, by delivering to and leaving with them a copy of this order at least five (5) days before the time set for hearing;

And it is further ordered: That the said defendant, Paramount Auto Exchange, on or before five (5) days before the time set for hearing, pay to said Bloodgood, Kemper & Bloodgood, attorneys, the fare from the southern state line, to wit, from Waukegan, Illinois, to Milwaukee, and return, and the sum of one and 50/100 dollars ($1.50) witness fees for the attendance of said Boswell at such examination.

Dated, Milwaukee, September 10, 1918.

By the court,

W. J. TURNER,
Circuit Judge.

53 (Endorsements:) 52777. Original. State of Wisconsin. Circuit Court Milwaukee County. Kentucky Finance Corporation, Inc., Plaintiff, vs. C. H. Allen and Paramount Auto Exchange, a corporation, Defendants. Order. Doerfler, Green, Bender & McIntyre, Formerly Doerfler, Green & Bender, 1312 First National Bank Building, Milwaukee, Wisconsin, Attorneys for deft. Paramount A. Ex. Due service admitted this — day of ——, 191-. —— —— Attorney for ——. Filed Sep. 13, 1918. C. C. Maas, Clerk. Filed Jan. 4, 1919. Arthur A. McLeod, clerk of Supreme Court, Wis.

54 Filed Oct. 31, 1918. C. C. Maas, Clerk.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendants.

Filed Jan. 4, 1919. Arthur A. Mcleod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN,
Milwaukee County, ss:

An order having been made by the said court requiring one T. E. Boswell, secretary of the above named plaintiff, to appear before the Hon. W. J. McElroy, a court commissioner in and for Milwaukee County, Wisconsin, under and pursuant to Section 4096 of the Re-

vised Statutes of the State of Wisconsin as an adverse party and as an officer of the plaintiff corporation and adversely, and there to testify and thereto give evidence in the above entitled matter; and said order having been duly modified by stipulation in accordance with the stipulation hereto annexed; and the court having modified its original order in accordance with said stipulation, and on this 23rd day of October, 1918, at 2 o'clock p. m. the defendant Paramount Auto Exchange, a corporation, appearing by Doerfler, Green & Bender, its attorneys, and the hour of 2 o'clock p. m. having arrived, and having waited a reasonable time thereafter and none of the other parties appearing herein, and the said T. E. Boswell, secretary of the plaintiff, failing to appear, notwithstanding said stipulation and the tender of the payment of the sum of $4.74,
55 being the legal mileage for attendance from the southern state line of the State of Wisconsin to the place of the proposed examination herein and return and $1.50 for witness fees for one day's attendance; and after filing also the letter of Albert K. Stebbins, a member of the firm of Bloodgood, Kemper & Bloodgood, attorneys for the plaintiff herein, the undersigned court commissioner does hereby report to your Honorable Court the proceedings had in accordance with your order and direction.

Attached hereto is the stipulation of date of October 10, 1918, and also the order of the court of date of October 12, 1918, and the letter of Albert K. Stebbins aforesaid.

Respectfully submitted,

W. J. McELROY,
Court Commissioner in and for
Milwaukee County, Wis.

56 Filed Oct. 31, 1918. C. C. Maas, Clerk.

Bloodgood, Kemper & Bloodgood,

Mitchell Building,

Milwaukee.

October 22, 1918.

Christian Doerfler, Esq.,
c-o Doerfler, Green, Bender & McIntre,
First National Bank Building,
Milwaukee, Wisconsin.

MY DEAR MR. DOERFLER:

In re Kentucky Finance Corporation v. Allen.

Your letter enclosing copy of stipulation and order as entered in the above matter has been duly received.

Of course you understand that Mr. Boswell will not appear before Mr. McElroy on the 23rd of October for reasons with which you are familiar. I should be obliged if you would get out your motion

papers promptly for the purpose of striking our complaint from the files so that we may appeal from both orders within thirty days from October 12th.

Yours very truly,

ALBERT K. STEBBINS.

A. K. S.:C. R.

Filed Jan. 4, 1919.
ARTHUR A. McLEOD,
Clerk of Supreme Court, Wis.

57 Filed Oct. 12, 1918. C. C. Maas, Clerk.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendants.

Stipulated by and between the parties hereto, by their respective attorneys, that the order heretofore made and entered herein requiring the secretary of the above named plaintiff corporation to appear and submit to an examination under the provisions of Section 4096 of the Revised Statutes of Wisconsin may be amended by inserting therein the following words, that is to say: "And it further appearing that said plaintiff appeared in open court and for itself, and for its said secretary, T. E. Boswell, consented that the said Boswell submit to an adverse examination pursuant to the terms and provisions of the statute at the City of Louisville, Kentucky, which is the residence of said corporation and of said Boswell, before any officer and at any time which might be designated by the court;" and that said order be further amended, so that the date for such examination shall be changed to October 23rd, 1918.

Dated, Milwaukee, October 10th, 1918.

BLOODGOOD, KEMPER & BLOODGOOD,
Plaintiff's Attorneys.

DOERFLER, GR[illegible]EN & BENDER,
Defendants' Attorneys,
Paramount Auto Exchange.

Filed Jan. 4, 1919.
ARTHUR A. McLEOD,
Clerk of Supreme Court, Wis.

Order on Stipulation.

Upon reading and filing the foregoing stipulation, and upon motion of Bloodgood, Kemper & Bloodgood, attorneys for the plaintiff,

It is ordered that the order heretofore made and entered herein, requiring T. E. Boswell, secretary of the above named plaintiff, to appear before a Court Commissioner in Milwaukee County, Wisconsin, and submit to an examination under the provisions of Section 4096 of the Revised Statutes of the State of Wisconsin, be, and the same hereby is amended so as to include the following words, that is to say: "And it further appearing that said plaintiff appearing in
open court and for itself, and for its said secretary, T. E. Bos-
58 well, consented that the said Boswell submit to an adverse examination pursuant to the terms and provisions of the statute at the City of Louisville, Kentucky, which is the residence of said corporation and of said Boswell, before any officer and at any time which might be designated by the court;" and that the date for such examination shall be changed to October 23rd, 1918, otherwise same time and place.

Dated, Milwaukee, October 12th, 1918.

By the Court.

W. J. TURNER,
Circuit Judge.

59 (Endorsements:) 52777. Original. State of Wisconsin. Circuit Court, Milwaukee County. Kentucky Finance Corporation, Inc., Plaintiff, vs. C. H. Allen and Paramount Auto Exchange, a corporation, Defendants. Commissioner's Report with Stipulation and Order. Doerfler, Green, Bender & McIntyre, formerly Doerfler, Green & Bender, 1312 First National Bank Building, Milwaukee, Wisconsin, Attorneys for deft. Paramount A. Ex. Due service admitted this 19th day of October, 1918. Bloodgood, Kemper & Bloodgood, Attorney- for Plaintiff. Filed Oct. 12, 1918. C. C. Maas, Clerk. Filed Jan. 4, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

60 Filed Nov. 1, 1918. C. C. Maas, Clerk.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendants.

Filed Jan. 4, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

An order having been duly made by the court on September 9, 1918, directing and ordering one T. E. Boswell, the secretary of the

plaintiff, a foreign corporation, to appear under and pursuant to the provisions of Section 4096 of the Statutes of Wisconsin, for the examination of said T. E. Boswell as such secretary, before pleading, on the 24th day of September, 1918, at two (2) o'clock p. m. of that day;

And the parties hereto having stipulated to an amended order, in accordance with the terms of such stipulation and of such amended order providing that such examination should take place before W. J. McElroy, a Court Commissioner, on the 23d day of October, 1918, at his office, in the City of Milwaukee, Wisconsin, at two (2) o'clock p. m. of that day;

And on said 23d day of October, 1918, the defendant, Paramount Auto Exchange, having appeared before said commissioner at the time and place stated in said amended order, for the purpose of proceeding with such examination; and the said T. E. Boswell failing to appear for such examination;

61 And the commissioner having been duly satisfied that all the provisions of the original order and of the amended order have been duly complied with on the part of the said defendant, Paramount Auto Exchange, and the tendering of the witness and travel fees, in accordance with the terms of such orders;

And said Court Commissioner having duly made a report of the proceedings at his office on said 23d day of October, 1918, which report has been duly filed herein;

Now therefore, upon the records, proceedings and files herein, and upon the report of the said Court Commissioner, let the plaintiff show cause before that branch of said court presided over by the Hon. W. J. Turner, at the court room of said Judge Turner, in the Masonic Building, situated on the southeast corner of Oneida and Jefferson streets, in the City of Milwaukee, Milwaukee County, Wisconsin, on the 2d day of November, 1918, at ten (10) o'clock a. m. of that day, or as soon thereafter as the matter may be reached in its order on the calendar, why an order should not be made in the premises, striking out the plaintiff's complaint herein, and dismissing the plaintiff's cause of action, with costs.

Let a copy of this order to show cause be served upon Bloodgood, Kemper & Bloodgood, attorneys for the said plaintiff, not later than November 1, 1918.

Dated, October 31, 1918.

By the Court,

LAWRENCE W. HALSEY,
Circuit Judge.

62 (Endorsements:) 52777. Original. State of Wisconsin, Circuit Court, Milwaukee County. Kentucky Finance Corporation, Inc., Plaintiff, vs. C. H. Allen and Paramount Auto Exchange, a corporation, Defendants. Order to show cause. Doerfler, Green, Bender & McIntyre, formerly Doerfler, Green & Bender, 1312 First National Bank Building, Milwaukee, Wisconsin, Attorneys for def't. Paramount A. Ex. Due service admitted this — day of ——,

191–. —— ——, Attorney for ——. Recd. Oct. 31, 1918, Bloodgood, Kemper & Bloodgood, Pltf's. Attys. Filed Nov. 1, 1918. C. C. Maas, Clerk. Filed Jan. 4, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

63 Filed Nov. 6, 1918. C. C. Maas, Clerk.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

versus

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendants.

To Bloodgood, Kemper & Bloodgood, attorneys for the plaintiff above named:

Please take notice that an order of which the within is a copy was duly entered in the office of the clerk of said court on the 5th day of November, 1918.

DOERFLER, BENDER & McINTYRE,
Attorneys for Defendant Paramount Auto Exchange, Milwaukee, Wis.

Dated this 5th day of November, 1918.

Filed Jan. 4, 1919.
ARTHUR A. McLEOD,
Clerk of Supreme Court, Wis.

64 Filed Nov. 5, 1918. C. C. Maas, Clerk.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

52777.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

versus

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendants.

Filed Jan. 4, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

The order to show cause herein, of the defendant, Paramount Auto Exchange, dated the 31st day of October, 1918, requiring the plain-

tiff to show cause before said court, before the Hon. W. J. Turner, judge presiding, why the plaintiff's complaint herein should not be dismissed, with costs, and said complaint stricken from the records, for the reason that one T. E. Boswell, the secretary of the plaintiff, did not appear before the Hon. W. J. McElroy, a Court Commissioner in and for Milwaukee County, Wisconsin, at the office of said commissioner, on the 23d day of October, 1918, at two (2) o'clock p. m. of that day, and submit to an examination under and pursuant to the provisions of Section 4096 of the Statutes of Wisconsin, and the acts amendatory thereof, for an adverse examination of the said Boswell, as such secretary of the plaintiff;

And said matter having duly come on for a hearing before said court, before the Hon. W. J. Turner, judge; and the defendant, Paramount Auto Exchange, appearing by Doerfler, Green, Bender & McIntyre, its attorneys, and the plaintiff appearing by Bloodgood, Kemper & Bloodgood, its attorneys, said plaintiff appearing in opposition to the application of the said defendant, Paramount
65 Auto Exchange;

And it appearing to the satisfaction of the court that all of the conditions to be performed by the defendant, Paramount Auto Exchange, have been complied with, in accordance with the terms of the original order and the amended order of the court herein made and served; and that the said T. E. Boswell, the secretary of the plaintiff corporation, failed, neglected and refused to appear for such adverse examination before said Court Commissioner, at the time and place stated in the court's order and amended order;

Now therefore, on motion of Doerfler, Green, Bender & McIntyre, attorneys for the defendant, Paramount Auto Exchange.

It is ordered: That the plaintiff's complaint be, and the same hereby is, stricken from the files, and the plaintiff's cause of action dismissed, with costs.

Dated, Milwaukee, November 4, 1918.

By the Court,

W. J. TURNER,
Circuit Judge.

66 [Endorsements:] 52777. Original. State of Wisconsin. Circuit Court, Milwaukee County. Kentucky Finance Corporation, Inc., Plaintiff, vs. C. H. Allen and Paramount Auto Exchange, a Corporation, Defendants. Order Dismissing Action. Doerfler, Green, Bender & McIntyre formerly Doerfler, Green & Bender, 1312 First National Bank Building, Milwaukee, Wisconsin, Attorneys for deft. Paramount A. Ex. Due service admitted this 4th day of November, 1918. Bloodgood, Kemper & Bloodgood, attorneys for plaintiff. Filed Nov. 6, 1918. C. C. Maas, clerk. Filed Jan. 4, 1919. Arthur A. McLeod, clerk of Supreme Court, Wis.

67 THE STATE OF WISCONSIN, *ss:*

Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION, Plaintiff,

against

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, Defendants.

STATE OF WISCONSIN,
Milwaukee County, ss:

I, C. C. Maas, Clerk of the Circuit Court, in and for the County of Milwaukee and State of Wisconsin, do hereby certify that the annexed and foregoing are the original notice of appeal and undertaking in the above entitled action, the original order mentioned in said notice of appeal, and the original papers used by each party on the application for the order appealed from; and the same are transmitted to the Supreme Court, pursuant to such appeal.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this third day of January, A. D. 1919.

[SEAL.] C. C. MAAS,
Clerk.

Filed Jan. 4, 1919.

ARTHUR A. McLEOD,
Clerk of Supreme Court, Wis.

68 [Endorsed:] Circuit Court, Milwaukee County. Kentucky Finance Corporation, against C. H. Allen and Paramount Auto Exchange. Return on Appeal to the Supreme Court. Filed Jan. 4, 1919, Arthur A. McLeod, Clerk of Supreme Court, Wis.

69 And afterwards, to-wit: on the 2nd day of December, A. D. 1919, the same being the 16th day of said term, the following proceedings were had in said cause in this Court:

Milwaukee Circuit Court.

KENTUCKY FINANCE CORPORATION, Appellant,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Respondents.

Upon the stipulation of the parties herein, by their attorneys, and upon motion, it is now here ordered that this cause be, and the same is hereby continued until the next term of this Court.

70 And afterwards to-wit: on the 10th day of January, A. D. 1919, the following stipulation was filed in this cause:

Milwaukee Circuit Court.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendant.

Stipulated by and between the parties hereto, by their respective attorneys, that the appeal taken by the plaintiff herein from certain orders may in all things be considered in the same manner as though separate and timely appeals had been taken from each of said orders, and that all questions incident to said orders, or either, any or all of them, properly reviewable, may be reviewed upon the single appeal taken therefrom.

(Signed) BLOODGOOD, KEMPER & BLOODGOOD,
Plaintiff's Attorneys.

(Signed) DOERFLER, BENDER & McINTYRE,
Attorneys for Defendant,
Paramount Auto Exchange.

Dated, Milwaukee, January 2nd, 1919.

71 And afterwards, towit; on the 5th day of March, 1919, the following supplemental return was filed in this cause, in words and figures following, that is to say:

72 Filed Mar. 3, 1919. Max. E. Binner, Clerk Circuit Court.

Circuit Court, Milwaukee County.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendant.

Filed Mar. 5, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

Now comes the above named plaintiff, by Bloodgood, Kemper & Bloodgood, its attorneys, and complaining of the above named defendant respectfully shows to the court and alleges:

First. That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky with its principal office and place of business at the City of Louisville in said

state, and that defendant, Paramount Auto Exchange, is a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin with its principal office and place of business at the City of Milwaukee in said state.

Second. That on the first day of July, 1918, at the City of Louisville, in the State of Kentucky, this plaintiff was the owner, and lawfully entitled to the immediate possession, of one 1918 Model 39 Haynes touring automobile, of the value of thirteen hundred forty-one dollars ($1,341) and still is the owner thereof.

Third. That on or about the first day of July, 1918, at the City of Louisville, Kentucky, the defendant, C. H. Allen wrongfully took said Haynes touring automobile from the possession of this plaintiff and unlawfully and fraudulently absconded with the same
73 beyond the limits of the State of Kentucky, fraudulently removed said automobile to the City of Milwaukee, Wisconsin, and at the time of the commencement of this action unjustly detained the same, to the damage of the plaintiff of one thousand dollars ($1,000.00).

Fourth. That on or about the 4th day of July, 1918, as this plaintiff is informed and verily believes, and in the furtherance of said unlawful intent, said defendant C. H. Allen unlawfully and fraudulently delivered said automobile to the above named defendant Paramount Auto Exchange, which said defendant unlawfully and fraudulently, as the agent of said defendant C. H. Allen, or under some claim derived from defendant and subsequent to rights of plaintiff placed in its garage at 142 Eighth street in the City of Milwaukee.

Wherefore this plaintiff demands judgment against said defendants, jointly and severally, for the recovery of the possession of said automobile or for the sum of thirteen hundred forty-one dollars ($1,341.00), the value thereof, in case a delivery cannot be had, together with one thousand dollars ($1,000.00) damages, and the costs and disbursements of this action.

BLOODGOOD, KEMPER & BLOODGOOD,
Attorneys for Plaintiff.

74 STATE OF KENTUCKY,
Jefferson County, ss:

T. E. Boswell, being first duly sworn, on oath says that he is one of the general officers, to wit: the Secretary, of Kentucky Finance Corporation, the plaintiff above named, makes this verification for and upon its behalf, and is duly authorized so to do; that he has read the foregoing complaint, knows the contents thereof, and that the same is true to his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

(Signed) T. E. BOSWELL.

Subscribed and sworn to before me this 17th day of August, 1918.
[SEAL.] VIRGIL O. DUFFIN,
Notary Public, Jefferson County, Kentucky.

My commission expires January 14, 1922.

(Endorsements:) No. 52777. Circuit Court Milwaukee County. Kentucky Finance Corporation, Inc., Plaintiff, vs. C. H. Allen et al., Defendant. Complaint. Original. Service admitted this 20th day of August, 1918. Doerfler, Green & Bender, Attys. for defendant Paramount Auto Exchange. Filed Mar. 3, 1919, Max E. Binner, Clerk of Circuit Court. Filed Mar. 5th, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis. Bloodgood, Kemper & Bloodgood, 306-315 Mitchell Bldg., Milwaukee.

75 STATE OF WISCONSIN, *ss:*

Circuit Court, Milwaukee County.

No. 52777.

KENTUCKY FINANCE CORPORATION, INC., Plaintiff,

against

C. H. ALLEN et al., Defendant-.

STATE OF WISCONSIN,
Milwaukee County, ss:

I, Max E. Binner, Clerk of the Circuit Court, in and for the County of Milwaukee and State of Wisconsin, do hereby certify that the annexed and foregoing is the original complaint filed and entered in the above entitled action, and that the same is hereby transmitted to the Supreme Court of the State of Wisconsin, pursuant to notice of appeal herein and supplemental to the return heretofore made.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 4th day of March, 1919.
[SEAL.] MAX E. BINNER,
Clerk,
By W. O. STAAB,
Deputy.

Endorsements: Circuit Court Milwaukee County. Kentucky Finance Corporation, Inc., against C. H. Allen et al. Supplemental return on appeal to the Supreme Court. Filed Mar. 5, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

76 And afterwards to-wit: on the 4th day of May, A. D. 1920, the same being the 27th day of said term, the following proceedings were had in said cause in this Court:

Milwaukee Circuit Court.

KENTUCKY FINANCE CORPORATION, Appellant,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Respondents.

And now at this day came the parties herein by their attorneys, and this cause having been argued by Albert K. Stebbins, Esq., for the said Appellant, and by Christian Doerfler, Esq., for the said Respondents, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

77 And afterwards, to-wit: on the 1st day of June, A. D. 1920, the same being the 35th day of said term, the judgment of this court was rendered in words and figures following, that is to say:

Milwaukee Circuit Court.

KENTUCKY FINANCE CORPORATION, Appellant,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Respondents.

Opinion by Justice Eschweiler.

This cause came on to be heard on appeal from the orders of the Circuit Court of Milwaukee County and was argued by counsel. On consideration whereof; it is now here ordered and adjudged by this Court, that the orders of the Circuit Court of Milwaukee County, appealed from in this cause, be, and the same are hereby, affirmed with costs against the said appellant taxed at the sum of Fifty-one and no/100 Dollars ($51.00).

Winslow, C. J., and Kerwin, J., took no part.

78 Thereupon the opinion of the Court by Justice Eschweiler was filed in words and figures following, that is to say:

STATE OF WISCONSIN:

In Supreme Court.

No. 77.

KENTUCKY FINANCE CORPORATION, Plaintiff and Appellant,

v.

C. H. ALLEN, Defendant; PARAMOUNT AUTO EXCHANGE CORPORATION, Defendant and Respondent.

Appeal from Two Orders of the Circuit Court for Milwaukee County.

W. J. Turner, Judge.

Affirmed.

Plaintiff is a corporation organized under the laws of, existing and doing business in, the state of Kentucky. Defendant corporation is of Wisconsin. Plaintiff instituted in the circuit court for Milwaukee county a replevin action based upon allegations to the effect that it was the owner of and lawfully entitled to a certain automobile; that about July 1, 1918, at the city of Louisville, Ky., the defendant C. H. Allen wrongfully took the said automobile from plaintiff's possession and unlawfully and fraudulently absconded with the same and brought it to the city of Milwaukee; that a few days thereafter the defendant Allen unlawfully and fraudulently delivered the automobile to the defendant corporation which still holds the same.

The defendant Allen is in default. The defendant corporation, appearing in said action, within due time moved the court for an order requiring one Boswell, at the time of the alleged conversion of the automobile and at the time of the motion secretary of the plaintiff corporation, to submit to an adverse examination and to produce papers, books, records, and matters in his possession as such secretary or under his control pertaining to the matters relevant to the controversy and pursuant to subdivision 7 of section 4096, Stats. Notice of the application for such order was duly served upon plaintiff's attorneys and the matter heard before said court, at which time the plaintiff appeared in open court through its attorneys, and for itself and for its said secretary Boswell consented to an examination of said Boswell pursuant to the terms and provisions of the
79 said statute, but at the city of Louisville, Ky., the residence of said corporation and of said Boswell, before any officer at any time which might be designated by the court.

An order was then made fixing a time and place within the city of Milwaukee for the examination of said Boswell as said secretary and requiring his attendance to submit to such examination and to have with him all papers, books, records, etc., in his possession

or under his control as such secretary relevant to the controversy. The order further required that the defendant should, five days before the time set for the hearing, pay to plaintiff's attorneys Boswell's fare from the southern state line of Wisconsin to Milwaukee and return and the sum of $1.50 as witness' fees.

At the time fixed for such examination said Boswell failed to appear, and no appearance was made at said time by the plaintiff; its attorneys having theretofore notified defendant's attorneys that Mr. Boswell would not appear at such hearing in Milwaukee. Thereupon, upon further showing to the circuit court by report from the court commissioner, an application was duly made to the circuit court by defendant for an order striking out the plaintiff's complaint and dismissing the cause of action with costs. On the hearing of such application appearance was made on behalf of both parties and an order entered striking out plaintiff's complaint from the files and dismissing plaintiff's cause of action, with costs. From both of such orders plaintiff has appealed.

ESCHWEILER, *J.*:

Defendants justify the order requiring plaintiff's secretary, a resident of Louisville, in the state of Kentucky, under the laws of which state the plaintiff corporation was organized and doing business, to appear for examination at Milwaukee and to produce plaintiff's books and papers, as being a proper exercise of the power vested in the trial court under the provisions of subdivision 7 of section 4096, Stats., which reads as follows:

"In case a foreign corporation is a party, the examination of its president, secretary, other principal officer, assignor, or agent or employe, or the person who was such, or either of them, at the time of the occurrence of the facts made the subject of the examination, may be had under the provisions of this section in any county of this state. The court may also, upon motion and such terms as may be just, fix a time and place in this state for such examination of any of said persons. Such persons so sought to be examined, as aforesaid shall attend at such time and place and submit to the examination, and then and there have with him all papers,
80 books, files, records, things, and matters in the possession of such person by reason of his relation to such corporation, relevant to the controversy. Such person sought to be examined as aforesaid shall attend at such time and place and submit to the examination, and, if required, attend for the purpose of reading and signing such deposition, without service of subpœna."

The second order appealed from which struck out plaintiff's complaint and dismissed his action for default in compliance with the preceding order is claimed to be justified under the provisions of subdivision 2 of section 4097, Stats., which reads as follows:

"(2) If any officer, agent, or employe or any person who was such officer, agent or employe of a foreign corporation, at the time of the

occurrence of the acts made the subject of the examination, be lawfully required to appear and testify, as provided in this chapter, either within or without the state, shall refuse and neglect so to do; or, if such person, when lawfully required, shall refuse and neglect to have with him any papers, books, files, records, things and matters in the possession of such party relevant to the controversy, such party may be punished as for a contempt and in the discretion of the court the pleading of such foreign corporation stricken out, and judgment given against it as upon the fault or failure of proof."

Plaintiff contends: First, that the said orders constituted an abuse of judicial discretion; and, secondly, that each of the statutes above quoted are unconstitutional, in that they violate the Fifth and Fourteenth Amendments to the United States Constitution. The first objection is not insisted upon in this court, the parties being desirous of having a determination upon the second point.

[1] The plaintiff cannot rely upon a claim that any such right as here asserted is secured to it under the Fifth Amendment to the United States Constitution. The first ten amendments to the United States Constitution do not apply to state government but only to the federal government itself. Minn. & St. L. R. R. Co. v. Bombolis, 241 U. S. 211, 36 Sup. Ct. 595, 60 L. Ed. 961, L. R. A. 1917 A, 86, Ann. Cas. 1916 E, 505.

The clause in the Fourteenth Amendment to the federal Constitution invoked by appellant on this appeal reads, so far as material here, as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appellant's contention is mainly directed to one proposition, and that is to the effect that there is no constitutional power within the circuit court to strike out plaintiffs complaint and dismiss its action for a default on its part to comply or cause a compliance with
81 an order which directs a nonresident individual as officer of a nonresident corporation to appear and submit to an examination and bring its records and papers within the jurisdiction of the state wherein such foreign corporation has commenced an action in such state court against a resident of such state; that to strike out the complaint and dismiss the action is in effect to deny such nonresident corporation the right to prosecute such action, and in effect denies it equal protection under the law and denies it equality to so litigate on the same footing as may Wisconsin residents, and therefore denies plaintiff the equality guaranteed to it by the federal Constitution.

Statutory provisions have long been established in this state and this court has upheld them granting power to the circuit court by striking out of pleadings and directing the entry of an appropriate judgment thereafter for defaults by such party in complying with some statu-

tory duty or some order of such court. Under subsection 1 of the same section 4097, Stats., here involved, authority is given to strike out the pleading of a party individual, either within or without the state, for a refusal to appear and testify. That such power might be properly exercised in the court's discretion does not seem to have been questioned or doubted in what was said by this court in Eastern R. Co. of Minn. v. Tuteur, 127 Wis. 382, 410, 105 N. W. 1067. Section 3072, Stats., provides for a dismissal of an action where proper proceedings are not taken within the time limited after the determination of an appeal to this court. Ex rel. Mitchell v. Johnson, 105 Wis. 90, 80 N. W. 110. Section 2811*a*, Stats., provides for the dismissal of pending actions in which there has been delay in bringing the cause to trial. Pereles v. Christiansen, 164 Wis. 163, 159 N. W. 817. Section 4064, Stats., authorizes the striking out of the pleading of a party who fails to attend as a witness when duly subpœnaed, and section 2664, Stats., permits such striking out for failure to file the same within a specified time, the validity of which was apparently unquestioned in Evans v. Rector, 107 Wis. 286, 289, 83 N. W. 292.

The provision here enforced is certainly no more drastic than in the above instances or than when the same result is arrived at so repeatedly upheld by this court in denying to a nonresident corporation which has failed to comply with the provisions of section 1770*b*, Stats., the right to even cross the threshold of our courts in attempting to enforce as against a resident here a contract made within this state. Similar remedies have been enforced in other jurisdictions. Gross v. Clark, 87 N. Y. 272, 273; Larimore v. Bobb, 114 Mo. 446, 21 S. W. 922; French v. Cent. Const. Co., 76 Ohio St. 509, 81 N. E. 751, 12 L. R. A. (N. S.) 669; Conrad v. Schoop Fruit Co. v. Bondurant, 134 Ky. 568, 121 S. W. 482.

82 The remedy here invoked must therefore be considered as a well-recognized and established method of legal procedure in the courts of this state, binding on all litigants subject to the jurisdiction of such courts, and whether residing within or without the state, unless and except as to some litigants it is within the prohibition of the Fourteenth Amendment to the United States Constitution, supra. So far as this case involves a claim by appellant of a violation under the federal Constitution it is controlled against their contention by the decision of Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645, affirming 81 Ark. 519, 100 S. W. 407, 1199, 126 Am. St. Rep. 1047. In that case a state statute requiring foreign corporations to produce books and papers for examination within the state in an action brought against such corporation was held not a violation of the due process of law guaranteed under the Fourteenth Amendment. In that case the order of the state court striking out an answer interposed by a defendant who has refused to so produce within the jurisdiction of that court matters of evidence deemed material was justified and upheld on the ground that it was in effect based upon the inherent right of a lawmaking authority to create a presumption of lack of merit in an asserted defense against a defendant who fails

to produce evidence when legally called upon to so do. 212 U. S. 353, 29 Sup. Ct. 381 (53 L. Ed. 530, 15 Ann. Cas. 645). The same case discusses the case relied upon by appellant here of Hovey v. Elliott, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215, and thereby renders it unnecessary to make further reference to or discussion of the latter case. Hovey v. Elliott is also discussed in the case of Roller v. Murray, 234 U. S. 738, 746, 34 Sup. Ct. 902, 58 L. Ed. 1570, in a manner clearly indicating that it is not applicable to the situation presented here; the plaintiff having had a full opportunity to be heard on the precise question involved—the right denied him in the Hovey Case.

Under subdivision 6 of the same section 4096, Stats., here involved, the examination of a resident of the state shall not be compelled in any other county than that in which such party resides, and it further provides that in case the plaintiff or defendant is a nonresident his deposition may be had in any county in this state in which he can be personally served with notice and subpœna. This provision in no wise avails the plaintiff as such nonresident corporation or its nonresident secretary, Boswell. As to the latter, he cannot well complain that his examination is being fixed at a place within some other county than that of his residence within the state, he having none such. Neither can he properly complain on the ground that he has not been served with subpœna within some county of the state, because plainly such provision is cumulative merely and
83 not intended to be the exclusive remedy for any such examination of a nonresident.

We hold therefore that where as here a nonresident corporation comes voluntarily into this state to seek the remedies afforded by the courts of this state as plaintiff against a defendant resident here, such plaintiff must submit to reasonable orders within the proper exercise of judicial discretion, requiring it to produce documentary evidence or to require its officers to submit to oral examination within the jurisdiction of such court; and in the absence of a showing, as is the case here, that such orders are made without notice to such plaintiff and an opportunity on its part to be heard, are arbitrary or oppressive, or require the plaintiff to do that which is beyond its power or ability to do, such orders will be enforced and upheld.

Orders affirmed.

84 STATE OF WISCONSIN:

In Supreme Court.

KENTUCKY FINANCE CORPORATION, Plaintiff in Error,

vs.

C. H. ALLEN and PARAMOUNT AUTO EXCHANGE, a Corporation, Defendants in Error.

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true

and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled cause.

That the original writ of error, the petition therefor and order allowing the same, the citation with its service endorsed thereon, assignment of errors and a copy of the bond are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, the 25th day of September, A. D. 1920.

[Seal Supreme Court of Wisconsin.]

ARTHUR A. McLEOD,
Clerk of Supreme Court of Wisconsin.

Endorsed on cover: File No. 27,947. Wisconsin Supreme Court. Term No. 590. Kentucky Finance Corporation, plaintiff in error, vs. Paramount Auto Exchange Corporation. Filed October 21st, 1920. File No. 27,947.

No. 156.

In the Supreme Court of the United States

OCTOBER TERM 1921.

KENTUCKY FINANCE CORPORATION,
Plaintiff in Error

vs.

PARAMOUNT AUTO EXCHANGE CORPORATION
Defendant in Error

BRIEF OF PLAINTIFF IN ERROR

MR. JACKSON B. KEMPER
MR. ALBERT K. STEBBINS
For Plaintiff in Error

STATEMENT OF CASE.

This is a writ of error brought by the plaintiff below to review a final judgment of the Supreme Court in the State of Wisconsin, duly entered on the 1st day of June 1920, sustaining an order of the Circuit Court of Milwaukee County, Wisconsin, directing that the plaintiff's complaint be stricken from the files and the plaintiff's cause of action dismissed with costs.

The facts are that on the 12th day of July, 1918, upon an affidavit made by its Secretary, the plaintiff in error caused to be replevined, by the Sheriff of Milwaukee County, an automobile which it was alleged was wrongfully detained at the garage owned and operated by the defendant in error in the City of Milwaukee, and thereupon a complaint was duly verified and filed which alleged that plaintiff in error was a corporation organized and existing under and by virtue of the laws of the State of Kentucky, with its principal office and place of business at the City of Louisville, in said state; that said defendant in error was a Wisconsin corporation, and that one C. H. Allen wrongfully took the automobile hereinbefore mentioned from the possession of the plaintiff in error at the City of Louisville, Kentucky, on the 1st day of July, 1918, and unlawfully and fraudulently absconded with the same beyond the limits of the State of Kentucky, fraudulently removing said automobile to the City of Milwaukee, Wisconsin, and that said Allen unlawfully and fraudulently delivered said automobile to the defendant in error and that said defendant in error unlawfully and fraudulently, as the agent of said Allen, or under some claim derived from him, retained possession of said car at its garage in Milwaukee, and that plaintiff in error was entitled to the immediate possession of said car.

After the seizure of said car by the sheriff, and the service of process and complaint upon the defendant in error, said defendant in errorr applied to the Circuit Court of Milwaukee County, pursuant to the terms and provisions of Section 4096 of the Statutes of Wisconsin, hereinafter set forth at length, requesting that a time

and place be set for the examination of the Secretary of the plaintiff corporation and that at such time said secretary bring with him at the place of hearing all papers, books, files, records and things and matters in his possession or under his control pertaining to the matters relevant to the controversy, and thereafter, in due course, said Circuit Court of Milwaukee County made and entered its certain order requiring said secretary, T. E. Boswell, to appear before a Court Commissioner at Milwaukee, Wisconsin, on a day set in said order as the time and place, within the State of Wisconsin, for such examination, and that said Boswell was further ordered to attend at such time and place and to submit to such examination, and to have with him the papers, books, files, records, things and matters in his possession or under his control relevant to the controversy and that such secretary be paid his fare from the southern state line of the State of Wisconsin, to wit: from Waukegan, Illinois, to Milwaukee, and return, and the sum of one and 50/100 dollars ($1.50) for witness fees.

Said secretary, Boswell, declined to come to the State of Wisconsin from the State of Kentucky upon the terms and for the purposes set forth in said order, but consented to submit to an adverse examinaion, pursuant to the terms and provisions of the Statutes of Wisconsin, at the City of Louisville, Kentucky, the residence of said corporation, and of said Boswell, before any officer and at any time which might be designated by the court.

Thereupon an order to show cause was secured by the defendant in error requiring said plaintiff in error

to show cause why, on account of the refusal of said secretary, Boswell, to appear and submit to such examination, its complaint should not be stricken from the files and the action dismissed with costs. Upon the hearing of said order to show cause a final order was entered striking said complaint and dismissing said cause of action.

From said order an appeal was taken by the plaintiff in error to the Supreme Court of the State of Wisconsin, setting forth among other things that the Circuit Court of Milwaukee County erred in the entry of said order for the reason that subdivision 7 of section 4096 and sub-division 2 of Section 4097 of the Statutes of the State of Wisconsin were unconstitutional, in that they violated the 5th and 14th amendments to the United States Constitution. Said case came on duly for hearing before said Supreme Court of the State of Wisconsin, and the action of the Circuit Court of Milwaukee County was sustained. Whereupon this writ of error was brought.

SPECIFICATION OF ERRORS.

The Supreme Court of the State of Wisconsin erred because sub-division 7 of section 4096 and sub-division 2 of section 4097 of the Statutes of Wisconsin are unconstitutional in that they violate the 5th and 14th amendments to the United States Constitution.

BRIEF OF ARGUMENT.

Sub-division 7 of section 4096 of the Statutes of Wisconsin provides:

"(7) In case a foreign corporation is a party the examination of its president, secretary, other principal officer, assignor, or agent or employe, or the person who was such, or either of them, at the time of the occurrence of the facts made the subject of the examination, may be had under the provisions of this section in any county of this state. The court may also, upon motion and such terms as may be just, fix a time and place in this state for such examination of any of said persons. Such persons so sought to be examined, as aforesaid shall attend at such time and place and submit to the examination, and then and there have with him all papers, books, files, records, things and matters in the possession of such person by reason of his relation to such corporation revelant to the controversy. Such person sought to be examined as aforesaid shall attend at such time and place and submit to the examination and if required attend for the purpose of reading and signing such deposition without service of subpoena."

Sub-division 2 of section 4097 of the Statutes of Wisconsin provides:

"(2) If any officer, agent or employe, or any person who was such officer, agent or employe of a foreign corporation at the time of the occurrence of the facts made the subject of the examination, being lawfully required to appear and testify, as provided in this statute, either within or without the state, shall refuse and neglect to have with him any papers, books, files, records, things and matters in the possession of such party relevant to the controversy such party may be punished as for a contempt and in the discretion of the court the pleading of such foreign corporation stricken out and judgment given against it as upon default or failure of proof."

The above sections are unconstitutional.

Hovey vs Elliott, 167 U. S. 409.

Hammond Packing Co. vs Arkansas, 212 U. S. 322

Foley vs Foley, 120 Cal. 33

Summerville vs Kelliher, 144 Cal. 155:

Harley vs Montana Ore Purchasing Co., 27 Mont. 288.

King Tonopah Mining Co. vs Lynch, 232 Fed. 485.

ARGUMENT

SUBDIVISION 7 OF SECTION 4096 AND SUBDIVISION 2 OF SECTION 4097 OF THE WISCONSIN STATUTES ARE IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The entire sections relating to adverse examination of parties are as follows:

"Examinations of adverse party before trial; procedure. Section 4096. 1. No action to obtain a discovery under oath, in aid of prosecution or defense of another action, shall be allowed; but the examination of the party, his or its assignor, officer, agent, or employe, or of the person who was such officer, agent, or employe, at the time of the occurrence of the facts made the subject of the examination, or in case a county, two or village, or city be a party, the examination of any officer of

such county, town, village, or city, otherwise than as a witness on a trial, may be taken by deposition at the instance of the adverse party in any action or proceeding, at any time after the commencement thereof and before judgment. As many such examinations may be had, at different times and places, as there are individuals to be examined; but no individual shall be examined more than once, except as hereinafter otherwise provided.

Deposition. 2. Such deposition shall be taken before a judge at chambers or a court commissioner on a previous notice to such party, and any other adverse party or their respective attorneys of at least five days; *or it may be taken without the state in the manner provided for taking other depositions.* Such portions of any such examination or examinations of any of the persons mentioned as are relevant to the issues in the case may be offered by the party taking any such examination or examinations and shall be received upon the trial of the action or proceeding in which it is taken, notwithstanding the person who was so examined may be present at the trial or proceeding.

Subpoena. 3. The attendance of the party to be examined, and the production of all papers, books, files, records, things, and matters in the possession of such party, his or its assignors, officers, agents, or employes, relevant to the controversy, may be compelled upon subpoena and the payment or tender of his fees as a witness. *If the party to be examined is a nonresident of this state, the court may upon motion fix the time and place of such examination.* He shall attend at such time and place and submit to the examination, and, if required, attend for the purpose of reading and signing such deposition, without service of subpoena.

Rules 4. Such examination shall be subject to the same rules as that of any other witness, but he shall not be compelled to disclose anything not relevant to the controversy.

Notice. 5. If such examination shall be taken before issue joined, the notice of taking the same shall be accompanied by an affidavit of the party, his agent, or attorney, stating the general nature and object of the action, that discovery is sought to enable the party to plead and the points upon which such discovery is desired, and such examination shall be limited to the discovery of the facts relevant to such points, unless the court or the presiding judge thereof, on motion and one day's notice, shall, before the examination is begun, by order, further limit the subjects to which it shall extend; but after service of the complaint the defendant may examine the plaintiff, his or its agent, employe, or officer, and the plaintiff may examine the defendant, his or its agent, employe, or officer, on all points set out in the complaint, as though the same had been put in issue; but such examination shall not preclude the right to another examination after issue joined upon all the issues in the cause, and the party examining shall, in all cases be allowed to examine upon oral interrogatories.

Venue. 6. *Such examinations shall not be compelled in any other county than that in which the party to be examined resides, except as hereinbefore provided; provided, however, that whenever plaintiff or defendant is a nonresident of this state his deposition may be had under the provisions of this section in any county in the state, if he can be personally served with notice and subpoena.*

Foreign corporation. 7. *In case a foreign corporation is a party, the examination of its president, secretary, other principal officer, assignor or agent or employe, or the person who was such, or either of them, at the time of the occurrence of the facts made the subject of the examination, may be had under the provisions of this section in any county of his state. The court may also, upon motion and such terms as may be just, fix a time and*

place in this state for such examination of any of said persons. Such persons so sought to be examined as aforesaid shall attend at such time and place and submit to the examination, and then and there have with him all papers, books, files, records, things, and matters in the possession of such person by reason of his relation to such corporation, relevant to the controversy. Such person sought to be examined as aforesaid shall attend at such time and place and submit to the examination, and, if required, attend for the purpose of reading and signing such deposition, without service of subpoena.

Contempt. 8. In any examination under these provisions the judge or commissioner before whom the same is had may compel the party examined to answer all questions relevant to the issues involved and also compel the production by him of books and papers relevant and pertinent to the issues *and may enforce such answers and the production of such books and papers by contempt proceedings.*

Stipuation waiving reading and signing. 9. Whenever a party shall be examined and his deposition taken under the provisions of his section the party taking such examination and the party examined, or their counsel, may stipulate upon the record before the judge or court commissioner before whom the examination is had, that the reading of the deposition to or by the deponent and his signature thereto are waived by consent, and that the deposition may be used with the same force and effect as if read over and signed; and in cases where such stipulation is made the said examination or deposition may be used in the action in which the same is taken and in any other action or proceeding in that or in any other court where it could have been used if read over and signed, with the same force and effect in all respects as if the deponent had read and signed the same.

Signing; transmittal. 10. In all cases where the reading and signatures shall not be waived as aforesaid, the said deposition shall be read over to or by the deponent and signed by him before the officer before whom the same was taken, and the attendance of the party examined for the purpose of reading and signing said deposition may be compelled in the same manner as his attendance for the pupose of submitting to such examination may now be compelled by law. It shall in all cases be delivered or transmitted by the officer before whom taken to the clerk of the court, magistrate or other person before whom the action or proceeding is pending securely sealed, and shall remain sealed until opened by the court or clerk thereof or such magistrate or other person.

Penalty for not testifying. Section 4097. 1. If any party lawfully required to appear and testify, as provided in this chapter, either within or without the state, shall neglect or refuse so to do, he may be punished as for a contempt and his pleading be stricken out and judgment given against him as upon default or failure of proof.

2. If any officer, agent, or employe, or any person who was such officer, agent, or employe of a foreign corporation, at the time of the occurrence of the facts made the subject of the examination, be lawully required to appear and testify, as provided in this chapter, either within or without the state, shall neglect or refuse so to do; or, if such person, when lawfully required, shall refuse and neglect to have with him any papers, books, files, records, things, and matters in the possession of such party relevant to the controversy, such party may be punished as for a contempt and in the discretion of the court, the pleading of such foreign corporation stricken out, and judgment given against it as upon default or failure of proof."

Sections 4096 and 4097 of the Statutes of Wisconsin make provision for two separate and distinct statutory rules of practice, each of which rules develops a scheme for the adverse examination of certain parties to actions before trial, and except for textual juxtaposition and cross references the two rules are not related to each other. Except for the provisions of Chapter 239 of the Laws of 1919 (which are not presently material here) the legislature has not attempted to develop a common scheme for the adverse examination of all parties, but has devised two schemes, different in practice and in penalties imposed, the one relating to foreign corporations and the other to all parties litigant. The first six subdivisions of Section 4096 and the first subdivision of Secton 4097 relate to and govern the examination of all natural persons being parties litigant, regardless of residence, and of all domestic corporations, while subdivision 7 of Section 4096 and subdivision 2 of Section 4097 relate solely to foreign corporations.

In order to thoroughly understand the purport of these sections as they now appear, it is necessary to consider somewhat their history, from which it appears how from small and conservative beginnings, by a series of slow and cautious legislative encroachments, the constitutional rights of certain parties have been limited and restricted in favor of certain other parties until, as a practical proposition, such burdens have been imposed upon foreign corporations that they are prohibited a free access to our courts by reason of the burdens imposed, and thereby, in the event that the controversy of such a corporation with a resident of Wisconsin is for a smaller sum than $3,000.00, it is left remediless.

What are now Sections 4096 and 4097 first appeared as Sections 54, 55 and 56 of Chapter 137 of the Revised Statutes of 1858. By this revision the action of discovery was abolished and it was provided that any party might be examined as a witness at the instance of an adverse party and compelled to give testimony in the action the same as any other witness, "either on the trial of the action or at any time before trial at the option of the party claiming it." It was further provided that a five-day notice of such proposed examination should be given; that the party should not be compelled to attend in any other county than that of his residence or where he might be served with a summons for his attendance, and that such attendance might be compelled in the same manner as that of any other witness, but, "when such adverse party is not a resident of this state his testimony may be taken upon commission in the same manner as provided by law, and by the rules of court, for the taking of the testimony of other witnesses upon commission;" and in this revision no particular penalty is imposed for the non-attendance of the party as a witness.

The right to conduct this adverse examination appeared as Section 4096 in the Revised Statutes of 1878, at which time the provision for such examination at the trial is omitted, but provision is made that the deposition may be taken "at any time after the commencement thereof (action) and before judgment," and further provides that a five-day previous notice must be given to the party, or to his attorney; that such examination may be taken without the state upon commission

in the manner of taking other depositions; that his attendance may be compelled upon subpoena, but that he shall not be compelled to disclose anything not relevant to the controversy, nor "in any other county than that in which the party to be examined resides," and further provides that upon one day's notice the court may "before the examination is begun, by order, limit the subject to which such examination shall extend," and in the same revision, by a new section numbered 4097, it is provided "that if a party being lawfully required to appear refuses so to do he may be punished as for a contempt, his pleadings stricken out and judgment given against him as upon a default or failure to prove."

It will be noted that the 1878 revision somewhat further protects the rights of the party to be examined than did the preceding revision of 1858, and specifically provided that the court might limit the scope of examination without reference to the fact that the examination was taken before or after pleading.

In the revision of 1898, by Section 4096, the practice for the adverse examination of parties was considerably elaborated, but no discrimination was made against non-resident litigants, whether corporate or natural; provisions were inserted applicable to the examination of the officers of a corporation being a party to the action; omitted the general right of the court to limit the scope of the examination, but provided that if an examination was taken before issue joined the notice of taking the same should be accompanied by an affidavit stating the general nature and object of the action, that dis-

covery was sought to enable the party to plead, the points upon which discovery was desired, and that the examination should be limited to the discovery of such facts unless the court, on one day's notice, should limit the scope thereof; continued the requirement that an examination should not be compelled in any other county than that in which the party to be examined resided, with the provision "that whenever plaintiff or defendant is a non-resident of this state his deposition may be had under the provisions of this section in the county in which the action is pending if he can be personally served with notice and subpoena in such county," and Section 4097 continues the same penalty as that provided in the 1878 revision.

By Chapter 29 of the Laws of 1899 Section 4096 was amended in certain generally immaterial matters of practice without, however, making any essential change.

By Chapter 244 of the Laws of 1901 Section 4096 was, however, practically re-written, and for the first time the discriminatory provisions against a foreign corporation appear in the following words:

> "In case a foreign corporation is a party the examination of its president, secretary, other principal officer, assignor, or agent or employe, or the person who was such, or either of them at the time of the occurrence of the facts made the subject of the examination, may be had under the provisions of this section in this state in the county in which the action may be pending, or in which it was originally brought, *if such officer or agent can there be personally served with notice for taking such deposition and a subpoena to attend such examination.*"

It will be noted that although this is the first time that a foreign corporation as a party litigant is set apart from other parties, the provision relative to the examination of officers is both harmless and proper; it is, in fact, nothing more than an expression of what should have been an obvious fact —that foreign corporations were subject to no other or different rules than domestic corporations when they appeared in this state as suitors—and at that time no amendment was made to Section 4097 prescibing penalties.

The provision last-above-noticed was, however, the entering wedge for real discrimination and appears without change for the first time as subdivision 7 of Section 4096 in Chapter 369 of the Laws of 1907.

By this time also the right to a general examination upon the allegations contained in the complaint had been granted to a defendant desirous of examining a plaintiff before pleading.

In the Wisconin Statutes of 1911 subdivision 7 of Section 4096 appears in its present form, as follows:

> "(7) In case a foreign corporation is a party the examination of its president, secretary, other principal officer, assignor or agent or employe, or the person who was such, or either of them, at the time of the occurrence of the facts made the subject of the examination, may be had under the provisions of this section in any county of this state. The court may also, upon motion and such terms as may be just, fix a time and place in this state for such examination of any of said persons. Such persons so sought to be examined, as aforesaid, shall

attend at such time and place and submit to the examination, and then and there have with him all papers, books, files, records, things and matters in the possession of such person by reason of his relation to such coporation relevant to the controversy. Such person sought to be examined as aforesaid shall attend at such time and place and submit to the examination and if required attend for the purpose of reading and signing such deposition without service of subpoena."

It will be observed that here all of the safeguards contained in Chapter 244 of the Laws of 1901 are removed. A foreign corporation is no longer placed upon the same footing in our courts as a domestic corporation. It is no longer required that the officer or agent be found within the state and served with a subpoena, but the time and place may be fixed by the court, upon motion, for the examination of any person, including, of course, a former agent or employe not then in the employment of the corporation, upon such terms as to the trial court may seem just, and in the 1911 statutes appears for the first time subdivision 2 of Section 4097, which provides:

"(2) If any officer, agent or employe, or any person who was such officer, agent or employe of a foreign corporation at the time of the occurrence of the facts made the subject of the examination, being lawfully required to appear and testify, as provided in this chapter, either within or without the state, shall refuse and neglect to have with him any papers, books, files, records, things and matters in the possession of such party relevant to the controversy, such party may be punished as for a contempt and in the discretion of the court the pleading of such foreign corporation stricken out

and judgment given against it as upon default or failure of proof."

In other words, if a former agent or employe of a foreign corporation, not at the time of the commencement of the action in the employment of the corporation, without service of subpoena upon him within the State of Wisconsin, refuses to respond to an order secured upon simple notice served upon the attorneys of his former employer in this state, and refuses to come to Wisconsin from a distant state for the purpose of submitting to an adverse examination, his former employer may be penalized, punished as for a contempt and its pleadings stricken from the files.

So, too, as in the case at bar, a foreign corporation, by its agents, in pursuit of stolen personal property, upon locating it within the State of Wisconsin and securing possession under a writ of replevin, may be stopped before it has fairly entered the courts of this state by the demand, made by a Wisconsin corporation alleged to be in possession of the stolen goods, that plaintiff's officers, at their own expense, come to Milwaukee with their records and submit to an adverse examination, and unless it complies with such demand—although expressing a willingness to have its officers fully examined at the place of their domicile—it may, without the service of a subpoena or other process, or showing that any of its officers were ever within the State of Wisconsin, be adjudged to be in contempt and punished as such by having its complaint stricken from the files and a judgment taken against it as upon a failure of proof.

Another instance of the natural result of this law, not given here as evidence of a possible abuse, but rather of a technically proper application of its rules to ordinary litigation, may be found where a corporate creditor, resident of New York or California, brings an action in the ordinary course of business for the recovery of a past-due account amounting to less than $3,000.00, and is met by the demand of the debtor that the principal officers of the corporation come to Wisconsin from New York or California for the purpose of submitting to an adverse examination, and upon the failure of such officers so to attend, the creditor is adjudged to be in contempt, its complaint stricken out and judgment rendered against it as upon a failure of proof.

This court may take judicial notice of the fact that ordinary commercial litigation rarely exceeds the sum of $3,000.00. It is, in fact, generally for an amount between $500.00 and $1,000.00, and in such a case Wisconsin has, for all practical purposes, closed the doors of its courts to creditors which, being corporations, are residents of foreign states, for the reason that no officer of a large corporation resident in California or New York could afford to leave his business and come to Wisconsin for the comparatively small amount involved, however willing he might be to submit to an examination at the place of his domicile, as authorized by this section of the statutes before the 1911 amendment. In the case of the ordinary commercial litigation the creditor may not avail himself of the alternative to commence his action in the U. S. District Court because the amount involved is not sufficient, and he is left to the mercies of the courts of this state.

So far as material here, the Fifth Amendment to the United States Constitution provides:

> "No person shall * * * be deprived of life, liberty or property without due process of law."

To which constitutional protection additional emphasis is given by Section 1 of the Fourteenth Amendment to the Constitution of the United States, which is as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In commenting upon Chapter 239 of the Laws of 1919, which attempts to extend the rule of Subdivision 7 of Section 4096 to non-resident natural persons who may become litigants in the State of Wisconsin, Mr. Chief Justice Winslow said in *George vs. Bode,* 175 N. W. 939:

> "There may be important and serious questions raised and argued when an order is made under this statute compelling a party in a distant state to appear in Wisconsin for examination under Section 4096. We shall not anticipate those questions now."

In the case at bar, it has presently become our duty to consider the above-suggested questions in so far as they relate to the officers of a foreign corporation.

The power of courts to strike from the files the pleadings of parties to actions actually in contempt, and to render judgment against said parties while in contempt as upon a default, is fully considered and the decisions of the English and American courts upon that subject thoroughly reviewed by the Supreme Court of the United States in *Hovey vs Elliott,* 167 *U. S.* 409 in that case the court concluded that the power to punish a party for contempt by striking his pleadings from the file and giving judgment against him was never claimed or exercised by the High Court of Chancery in England, nor by any of the courts in this country, excepting only in New York and Arkansas, and finally decided that such power did not exist in the courts and could not exist under the Constitution of the United States.

In the *Hovey case,* the Supreme Court of the District of Columbia made an order striking the answer of the defendant from the files and directing that a decree be taken *pro confesso* simply because the defendant was held to be guilty of contempt in neglecting to pay into court money held by him which was the subject of the controversy in suit and declining to appear when summoned to do so. The U. S. Supreme Court, before entering upon its analysis of the cases, said (pages 418-19):

> "Perhaps no definition is more often quoted than that given by Mr. Webster in the *Dartmouth College cases* 'By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, prop-

erty and immunities under the protection of the general rules which govern society.'

And that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law, is well illustrated by another observation of Judge Cooley immediately following the language just quoted, saying: 'The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they proceed upon inquiry and render judgment only after trial.'

The necessary effect of the judgment of the Supreme Court of the District of Columbia was to decree that a portion of the award made in favor of the defendant, in other words, his property, belonged to the complainants in the cause. The decree, therefore, awarded the property of the defendant to the complainants upon the hypothesis of fact that by contract the defendant had transferred the right in or to this property to the complainant. If the court had power to do this, by denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one and giving it to another without hearing or without process of law. If the power to violate the fundamental constitutional safeguards securing property exists, and if they may be with impunity set aside by courts on the theory that they do not apply to proceedings in contempt, why will they not also apply to proceedings against the liberty of the subject? Why should not a court in a criminal proceeding deny to the accused all right to be heard on the theory that he is in contempt, and sentence him to the full penalty of the law. No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of the citizen as the other. The one as pointedly as the other would convert the judicial department of the government into an engine of

oppression and would make it destroy great constitutional safeguards.

But the argument is that however plain may be the want of power in all other branches of the government to condemn a citizen without a hearing, both upon the elementary principles of justice and under the express language of the Constitution, these principles do not limit the power of courts to punish for contempt or as for contempt, because it is asserted that from the earliest times the Chancery Court in England has possessed and exercised the power to refuse the right to be heard to one in contempt, and that a power so well established in England, before the adoption of the Constitution and which has been so often exercised since, is not controlled by the principles of reason and justice just stated. But this contention is without solid foundation to rest upon, and is based upon a too strict and literal rendering of general language to be found in isolated passages contained in the works of writers on ancient law and practice, and on loose statements as to the practice of the Court of Chancery to be found in a few decisions of English courts. Certain it is that in all he reported decisions of the Chancery Courts in England no single case can be found where a Court of Chancery ever ordered an answer to be stricken from the files and denied to a party defendant all right of hearing because of a supposed contempt. And in the American adjudications, whilst here are two cases, one in New York and the other in Arkansas, asserting the existence of such power, an analysis of these cases and the authorities upon which they rely will conclusively show the erroneous characer of the conclusions reached."

And in concluding that the power to thus penalize did not exist, and that the judgment of the Supreme Court of the District of Columbia was void, the court further said (pages 444-5):

"The right which was here denied by rejecting the answer and taking the bill for confessed because of the contempt involved an essential element of due process of law, and our opinion is herefore exclusively confined to the cases before us. The demonstration of the unsoundness of the contention that courts of equity have claimed and exercised the power to suppress an answer and thereupon render a decree *pro confesso,* which results from the foregoing review of the authorities, is strengthened by the reflection that if such power obtained then the ancient common law doctrine of 'outlawry,' and that of the continental systems as to 'civil death,' would be a part of the chancery law, a theory which could not be admitted without violating the rudimentary conceptions of the fundamenal rights of the citizen.

It being therefore clear that the Supreme Court of the District of Columbia did not possess the power to disregard an answer which was in all respects sufficient and had been regularly filed, and to ignore the proof taken in its support, the only question remaining is whether a judgment based upon the exercise of such an assumed power is void for want of jurisdiction and may therefore be collaterally attacked. It cannot be doubted that where a judgment is rendered without the issuance and service of summons against a party who did not enter an appearance, the court rendering it is without jurisdiction to do so, and it can be assailed as void whenever presented as a muniment of right as against another. Looking at the substance and not the form of the decree in the case of *Hovey vs. McDonald,* upon which the rights of the plaintiff in error depend, it is plain that the judgment was substantially one without a hearing, for of what efficacy or avail was the summons to appear when the court which issued the summons rendered its judgment upon the theory that the summons was inefficacious, and that the defendant had no right

> either to appear or to be heard in his defense? As said by his court in *Adams vs. Postal Telegraph Cable Co.,* 155 U. S. 689, 698, 'The substance and not the shadow determines the validity of the exercise of the power.'"

Subsequently, in the case of *Foley vs. Foley,* 120 Cal. 33, a similar question arose in California under a statute specifically authorizing the punishment of a party who refused to appear and sign a deposition by adjudging him to be in contempt and entering judgment against him as upon a default. In this case the Supreme Court of California considered and adopted as binding upon it the rule established in *Hovey vs. Elliott,* supra, and, referring directly to the statute authorizing the penalizing act, said (page 42):

> "But it is urged that, aside from the question of the inherent power of the court, section 1991 of the Code of Civil Procedure expressly authorized the action of the court because of the defendant's reusal to subscribe his deposition. In response to this, appellant contends that the evidence did not warrant the court in holding that he was guilty of such refusal. As to this fact, however, we need not inquire, for it is obvious that, if that section were intended to authorize the action here taken, it is to that extent obnoxious to the principles stated in *Hovey vs. Elliott, supra.* Where a given act amounts to the invasion of a constitutional right, we can perceive no well-founded distinction in principle whether such invasion come from an attempted legislative sanction, or from the naked, unauthorized act of the court. The one is as ineffectual as the other."

The above case was followed by the same court in *Summerville vs. Kelliher,* 144 Cal. 155, and the court said (page 160):

> "The law authorizing he court to strike out the answer of a party for a refusal to attend when required and give his deposition (Code Cw. Proc. Sec. 1991) is unconsitutional as tending unduly to restrict the right to defend an action. *Foley vs. Foley,* 120 Cal. 40; *Hovey vs. Elliott,* 167 U. S. 409."

The Supreme Court of Montana, in *Harley vs. Montana Ore Purchasing Co.,* 27 Mont. 388, also quoted with approval the language used in *Horey vs. Elliott, supra,* and, following the rule there announced, refused to sustain a judgment entered against one of the defendants who had been refused the right to testify at the trial upon the ground that he had theretofore been adjudged guilty of a contempt by violating an injunction which had been entered in the case.

From the foregoing cases it is respectfully submitted that so far as the rights of natural citizens are concerned no court, whether acting under a statute or an alleged inherent judicial power has the right to deny to a party being in contempt the right to be heard before a final judgment be entered against it.

It may, however, be claimed that a different rule prevails where a foreign corporation is a party. It is respectfully submitted that a corporation, even though it be a foreign corporation, is not as yet an outlaw, and that when it appears as a suitor in any American court it is fully entitled to due process of law.

It is, of course, elementary that for constitutional purposes a corporation is a citizen of that state under the laws of which it is created. From this it follows as a necessary consequence that although, on grounds of public policy and for self-protection, a state may impose

rules and conditions subject to which a foreign corporation may be authorized to transact business within its limits, it has no power to discriminate against such a corporation being a citizen of a sister state which, without attempting to transact business within the state of the forum, merely as an American citizen enters such state for the sole purpose of demanding justice against a local resident.

The general question here under consideration was again discussed by this court in *Hammond Packing Co. vs. State of Arkansas*, 212 U. S. 322.

In considering the *Hammond* case, it must be borne in mind that it in no sense reverses *Horey vs. Elliott*, 167 U. S. 407. The law as expressed in the *Horey* case continues to be the law of the land, while in the *Hammond* case, this court merely decided that in the particular case the rule announced in *Horey vs. Elliott* was not applicable.

The statute of Arkansas which was considered in the *Hammond* case is set forth at length in the margin of the official report, pages 336-339, and is stated in substance in the opinion.

Briefly, it was provided that in the event any foreign corporation transacting business within the State of Arkansas should become a member of any trust, pool, or combination, it should be prevented from continuing business in the state, and that proceedings for that purpose should be commenced by the Attorney General in the name of the state, and if the officers of such foreign corporation charged with being a member of a trust, combination, or

pool, were non-residents of the State of Arkansas, the Attorney General might file with the court a statement in writing setting forth the names of the person or persons whose testimony he desired, the time and place where he desired them to appear, and thereupon the Judge should make an order for the taking of such testimony and appoint a commission for that purpose, who should be an officer authorized by the law of Arkansas to take depositions, and the commission should immediately issue a notice, directed to the attorneys, agents, or officers of the corporation, requiring the designated officers to appear, at a time and place to be fixed, to testify. Nothing is said relative to the place where the deposition is to be taken, but by a proviso it is required that in fixing the time for reaching a designated place in Arkansas, the same number of days shall be allowed as in the taking of other depositions, and by a further proviso it was provided that service of such notice might be made by any one authorized by law to serve a subpoena.

The section providing for a penalty is peculiar in that it is enacted that in the event any person required to attend and testify fails to appear the pleadings of the respondent may be stricken out, and the court "shall proceed to render judgment by default against said corporation." But if the persons required to testify are found within the State of Arkansas, served there with a subpoena and thereafter refuse to appear, then the pleadings shall be stricken out and "judgment in said case rendered against said corporation."

From the foregoing it is clear that judgment against the corporation, where subpoena was not served upon the officers whose testimony was desired, was not to be upon the merits, but where service was in fact made and the officers refused to appear, then the judgment should be entered upon the merits. No suggestion is made in this statute that the failure of the officers to appear shall be considered as a contempt or that the penalty imposed shall be one resulting from a contempt, and, as will be hereafter noted, the Supreme Court held that the failure to appear merely caused a presumption of fact to arise to the effect that the respondent was unable to meet the charges of the Attorney General.

It must be borne in mind that this statute referred exclusively to corporations which were in fact transacting business within the State of Arkansas.

It appeared in this case:

1st: That the Hammond Packing Company was engaged as a foreign corporation in business in Arkansas, having received a permit for that purpose (page 331);

2nd: That the Hammond Company itself was notified to produce the witnesses and that the attorneys merely appeared and declined to comply with the notice (page 339);

3rd: That the place of taking the depositions was in fact fixed at the City of Chicago, where the

designated witnesses resided (pages 337 and 339).

It is assumed throughout the opinion by this Court that the jurisdictional fact in the case was that the Hammond Company had, by entering the State of Arkansas and securing a permit to transact business there, submitted, under the familiar rulings relative to foreign corporations, to the several limitations imposed upon such corporations by the laws of that state.

In comparing the *Hammond* case with the case at bar it is apparent that while the Arkansas statute might possibly be construed in violation of the due process provisions of the United States Constitution, the words of the law do not compel such a construction, and in its application to the particular case the Attorney General studiously observed all of the constitutional rights of the defendant. On the other hand, Subdivision 7 of Section 4096 by its terms invites an exercise by the court of unconstitutional powers, and in the instant case the respondent, in its attempted application of the law, fully accepted the invitation of the law and violated each of the rights of the foreign corporation which the Attorney General, in the *Hammond* case, had so carefully protected.

In its first consideration of the Arkansas act this Court emphasized the fact that a state might not do an unconstitutional act through its Legislature with greater impunity than it might do through its courts in the following words:

"Merely because the power to strike out an answer and enter a default, which was exerted by the court below in this case, was authorized by the ninth section of the statute furnishes no ground for taking this case out of the ruling in *Hovey vs. Elliott*, if otherwise controlling. The fundamental guarantee of due process is absolute and not merely relative. The inherent want of power in a court to do what was done in *Hovey vs. Elliott* was in that case deduced from no especial infirmity of the judicial power to reach the result, but upon the broad conception that such power could not be called into play by any department of the Government without transgressing the constitutional safeguard as to due process, at all times dominant and controlling where the Constitution is applicable. Indeed, in *Hovey vs. Elliott* the impotency of the legislative department to endow the judicial with the capacity to disregard the Constitution was emphasized. But while this is true, the question yet remains, Is the doctrine of *Hovey vs. Elliott* here applicable?"

After a consideration of the United States laws relative to the production of documents by an adverse party and the laws of the several states relative to such production, accompanied in many instances with a grant of authority to the court to strike out the pleadings of a recalcitrant party and rendering judgment against him as upon a default, the court held that such penalty was not punishment as for a contempt; that a distinction existed between the want of authority to punish for contempt, as ruled in *Hovey vs. Elliott*, and the power to create a presumption of fact; that power to compel the giving of testimony and production of documents "by proper regulations prescribed by the

legislative authority" was recognized, and that, in the particular case, the failure of the Hammond Packing Company to respond in the proceedings instituted by the Attorney General created a presumption that there was a lack of foundation to the defense asserted by the Hammond Packing Company, and in concluding the court said (page 354):

> "In so deciding, our conclusion is, of course, based upon the legality and sufficiency of the order to produce made under Section 8 of the act, and as our decision on that subject rests upon the extent of the visitorial power which the State had the right to exercise *over a corporation subject to its control*, our ruling as to the legality of the call under Section 8 is confined to the case before us."

It is therefore respectfully submitted that the *Hammond* case in no way sustains the contentions made by the defendant in error here. In the *Hammond* case a public question was involved. It was against the established policy of Arkansas that any foreign corporation which had availed itself of the Arkansas laws and secured a permit to transact business in that state, should also be a member of any pool or any combination in restraint of trade in some other state; by submitting to the laws of Arkansas and securing a permit to do business thereunder, the Hammond Company also submitted to the visitorial powers of the State of Arkansas; in the exercise of these powers, the Attorney General, in the name of the State, instituted proceedings to ascertain whether or not the

Hammond Company was a member of a combination in restraint of trade, and if so, to impose the statutory penalty. The Hammond Company adopted dilatory tactics; a commission was appointed, and by that commission a notice was issued requiring certain officers and employes of the Hammond Company to appear, not in Arkansas, but at their home city of Chicago; this notice was of itself process—it was issued by the commission and the law provided that it might be served by any person qualified to serve a subpoena; the notice was served upon the corporation, its attorneys appeared before the commission at Chicago and declined to produce the information demanded. Thereupon it was in effect determined, as stated by this Court, that a presumption of fact arose under which the Hamon Company had failed in its defense, and judgment was entered accordingly.

In the case at bar it will be noted that Section 4096 in terms is in violation of the Fifth and Fourteenth amendments to the United States Constitution and of the rule in *Hovey vs. Elliott*. In its general interpretation it is opposed to the same constitutional provisions and court decisions, while in its particular application in this case every guaranty was violated. There was no notice served upon the plaintiff, the court required the attendance of the officers of the corporation not at their own home, but at Milwaukee, Wisconsin, no process was served upon the plaintiff of any nature whatsoever, and under the provisions of the law the pleading was stricken out as for a contempt.

The general principle here involved was considered by the U. S. District Court of Nevada in the case of *King Tonopah Mining Co. vs. Lynch,* 232 Fed. 485. In that case the King Tonopah Mining Company was a Utah Corporation. It never qualified to do business in the State of Nevada, never did any business there, but did own certain real estate in the Tonopah Mining District of that state. The foreign corporation law of Nevada required every such corporation *"owning property or doing business"* in that state to appoint an agent upon whom all process might be served and in the event of its failure to appoint such an agent provision was made for the service of process upon the Secretary of State. In an action commenced against the Tonopah Mining Company service was made under the above statute upon the Secretary of State; the corporation did not appear; judgment was entered against it acording to the demand of the complaint, and thereafter said company brought a suit in equity in the U. S. District Court for Nevada for relief against such default judgment. In justification of the judgment, it was claimed by the judgment creditor that the service was valid, that, by coming into the state and owning property there, the Utah corporation waived its general constitutional rights and consented to he conditions imposed upon it by the statute, but after a full review of the authorities it was held that the service in question did not constitute due process of law, and the court said (page 491-2):

> "It is true, there are constitutional rights which may be waived; that is, one may voluntarily refrain from claiming or exercising them. But it does not follow from this that a state may by statute exact

from a corporation a valid, express agreement to abandon any such right. Nor does the circumstance that such a corporation acquires or holds property in the state or does business therein at a time when the statutes of the state prohibit the exercise of a constitutional right, warrant the presumption that the corporation has agreed to waive that right. *Pope Mfg. Co. vs. Gormully,* 144 U. S. 224, 234, 12 Sup. Ct. 632, 36 L. Ed. 414; *Blake vs. McClung,* 172 U. S. 239, 255, 19 Sup. Ct. 165, 43 L. Ed. 432. In *Insurance Co. vs. Morse,* 20 Wall. 445, 451, 22 L. Ed. 365, Justice Hunt says:

'Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in *Cancemi's Case* (18 N. Y. 128), be tried in any other manner than by a jury of 12 men, although he consent in open court to be tried by a jury of 11 men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and all occasions whenever the case may be presented.'

(3) Under the Constitution, the company in this suit is entitled to due process; and if the service in question, in and of itself, does not constitute such process, then its binding force, if any it has, rests on an assumed consent of the company, or on the power of the state to limit and abridge the constitutional guaranty of due process. Consent can

be predicted only on the presumption that, when it entered the state, the company knew and accepted the laws of the state, and by failing to appoint a resident agent indicated its willingness to be served in the manner prescribed by the statute. The presumption that every man knows the law does not hold him to a knowledge of statutes which for any reason are illegal or void; and a constructive agreement to submit to a void or an illegal statute certainly cannot be founded on anything less than actual knowledge of the statute itself. No such knowledge is shown in the instant case. The same argument has been pressed, without avail, on the Supreme Court of the United States in support of the contention that a corporation, entering a state not of its origin is presumed to know and consent to statutes prohibiting it from exercising the right of removal.

(4) To admit that a method of service, whether it amounts to due process of law or not, is sufficient because it is prescribed by state statute, is to admit that a state may impair rights guaranteed by the national Constitution. The prohibitions of the Constitution cannot thus be evaded. *Fayerweather vs. Ritch*, 195 U. S. 276, 25 Sup. Ct. 58, 49 L. Ed. 193; 5 Ency. U. S. Sup. Ct. Rep. 627.

In *Chicago, B., Etc., R. R. vs. Chicago*, 166 U. S. 226, 234, 17 Sup. Ct. 581, 584 (41 L. Ed. 979), it was said:

'A state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not

to form. This court, referring to the Fourteenth Amendment, has said: "Can a state make anything due process of law which, by its own legislation, refuses to declare such? To affirm this is to hold that the prohibition to the state is of no avail, or has no application where the invasion of private rights is affected under the forms of state legislation."'

(5) It is unnecessary to produce authorities to the effect that a foreign corporation, as a penalty for failing to file a list of its officers with the Secretary of State, or to designate an agent upon whom process may be had, can be deprived of its property without due process of law. As well might it be said that a state may punish murder by depriving a murderer of the right of trial by jury. It necessarily follows from this that a state may not, by prescribing fhat shall constitute due process of law, subtract anything from the right which is recognized and established as due process in the federal Constitution. *Grannis vs. Ordean*, 234 U. S. 385, 34 Sup. Ct. 779, 58 L. Ed. 1363."

In applying the rules of the foregoing decisions to the instant case it clearly appears that no American court, whether in the exercise of its inherent powers or express statutory authority, has the right either to adjudge a party in contempt because of failure to obey process never personally served, or to deny a hearing to any party because of the fact that he may be in contempt. It is equally certain that this right to due process of law, this right to be heard before condemnation and to be bound by a judgment only after trial, is as much the constitutional right of a foreign corporation as of any other American citizen. The claim that a party entering a state for the purpose of asserting or defending a property right, not created by

the state but existing independently of it, by that act submits to the provisions of such statutes as Subd. 7 of Section 4096 and Subd. 2 of Section 4097 is fully met by the court in the *King Tonopah Mining Company Case,* items 3 and 4 (supra). The prohibition of the constitution can not thus be evaded by statute or disregarded by the courts.

It may not be said to a litigant in Wisconsin, even though that litigant be a foreign corporation, that it may be punished for contempt without the service of process and then denied a hearing and judgment rendered against it because of such ficticious contempt.

It is difficult to conceive a more flagrant violation of the "due process" provision of the Uinted States Constitution. Prior to 1911 the legislature at least guarded with due care the right of the litigant to service of subpoena within the state before compelling an adverse examination; the language relating to the officers of a foreign corporation was "If he can there (within this state) be personally served with notice for taking such deposition and a subpoena to attend such examination;" not until 1911 were these "due process" provisions disregarded and it is respectfully submitted that this legislative attempt to penalize a foreign corporation which seeks to assert or defend its rights in the courts of this state is an usurpation of power and that subdivision 7 of Section 4096 and subdivision 2 of Section 4097 are unconstitutional and void.

JACKSON B. KEMPER,
ALBERT K. STEBBINS,
of Counsel for
Plaintiff in Error.

NO. [redacted]17

IN THE

Supreme Court of the United States

October Term, 1921.

KENTUCKY FINANCE CORPORATION,

Plaintiff in Error,

vs.

PARAMOUNT AUTO EXCHANGE CORPORATION,

Defendant in Error.

Brief of Defendant in Error

MR. WALTER H. BENDER,

For Defendant in Error.

WETZEL BROS. PTG. CO., MILWAUKEE, WIS.

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IN THE

Supreme Court of the United States

October Term, 1921.

NO. 156.

KENTUCKY FINANCE CORPORATION,
Plaintiff in Error,

vs.

PARAMOUNT AUTO EXCHANGE CORPORATION,
Defendant in Error.

Brief of Defendant in Error

STATEMENT.

The plaintiff in the court below brings this writ of error to review a final judgment of the Supreme Court of the State of Wisconsin (Transcript, pp. 40-45) entered on the first day of June, 1920 (171 Wis. 586; 178 N. W. Rep. 9), affirming an order of the Circuit Court of Milwaukee County, Wisconsin, which directed the plaintiff to produce its secretary and certain of its books and records at a specified time and place within the state of Wisconsin for examination, and affirming a further order of said Circuit Court which struck the plaintiff's complaint from the files and dismissed plaintiff's cause of action with costs because of its refusal to comply with the former order. (Transcript, pp. 33-34.)

The plaintiff in error is a Kentucky corporation (Transcript, p. 17), and the defendant is incorporated under the laws of Wisconsin (Transcript, p. 25). The plaintiff in error began a replevin action in the Circuit Court of Milwaukee County, Wisconsin, to obtain possession of an automobile then held by the defendant (Transcript, pp. 17-18). The complaint set forth that another defendant, C. H. Allen, had wrongfully taken the automobile from the possession of plaintiff in error at Louisville, Kentucky, and fraudulently removed it to Milwaukee, Wisconsin, where he delivered it to the defendant corporation, which holds it upon some claim derived from Allen (Transcript, pp. 36-37).

Allen defaulted in the action. The defendant corporation duly and seasonably moved the court under Sec. 4096, Wis. Stats., for an order requiring T. E. Boswell, secretary of plaintiff in error, to appear at a time and place to be fixed by the court, within the State of Wisconsin, bringing certain documentary evidence in his official custody, and submit to an adverse examination (Transcript, pp. 24-26). Notice of this motion was duly given and plaintiff in error appeared and was heard upon the merits thereof, opposing the granting of the order sought (Transcript, pp. 26-27). After hearing both parties, the court granted the motion of the defendant corporation, and directed Boswell to appear before a designated Court Commissioner at a time and place in the City of Milwaukee specified in the order, bringing with him certain corporate records in his official custody, and to submit to the proposed examination. The court directed the formal service of this order upon, and the

payment of certain witness fees to attorneys for plaintiff in error, by the defendant corporation (Transcript, pp. 27-28, 30-31).

The defendant corporation complied with the conditions imposed upon it by the order, but the plaintiff in error, through its attorneys, formally refused to comply therewith, or to submit to any examination except at its place of residence in Kentucky (Transcript, pp. 28-31).

Thereupon the defendant corporation moved the court, upon the foregoing facts, and under the provisions of Sec. 4097, Wis. Stats., to strike out the complaint and dismiss the action, with costs. Both parties appeared and were heard on this motion. The court ordered the complaint stricken and the action dismissed, with costs (Transcript, pp. 31-34).

The plaintiff in error appealed to the Supreme Court of Wisconsin, both from the order directing the holding of the examination and the order dismissing the complaint (Transcript, pp. 10-11). The Supreme Court of Wisconsin affirmed both of these orders (Transcript, pp. 40-45). Thereupon the plaintiff brought the cause to this court to review this decision of the Supreme Court of Wisconsin.

POINTS RAISED BY SPECIFICATION OF ERRORS.

1. Do the challenged provisions of Sections 4096 and 4097, Wis. Stats., contravene the provisions of the Fifth Amendment to the Federal Constitution?

2. Do the challenged provisions of Sections 4096 and 4097, Wis. Stats., contravene the "equal protec-

tion of the law" clause of the Fourteenth Amendment to the Federal Constitution?

3. Do the challenged provisions of Sections 4096 and 4097, Wis. Stats., contravene the "due process" clause of the Fourteenth Amendment to the Federal Constitution?

OUTLINE OF ARGUMENT.

I.

The Fifth Amendment to the Federal Constitution does not apply to State Governments, but only to action of the Federal Government. Hence this court will not test state statutes by the provisions of that Amendment.

Minneapolis & St. Louis Railway vs. Bombolis, 241 U. S. 211-217; 60 L. ed. 961-963; 30 Sup. Ct. 595; and cases cited.

Eising vs. Pennsylvania, 227 U. S. 592; 57 L. ed. 658, 661; 33 Sup. Ct. 321. (Specifically as to Fifth Amendment.)

II.

The challenged provisions of Secs. 4096 and 4097, Wis. Stats., do not contravene that portion of the Fourteenth Amendment to the Federal Constitution which forbids a state to "deny to any person within its jurisdiction the equal protection of the laws."

1. The argument of plaintiff in error on this point.
2. The Fourteenth Amendment to the Federal Constitution prohibits any state from denying equal protection of its laws to any person "within its jurisdiction." Since the plaintiff in error does not appear to have complied with the laws of Wisconsin so as to be entitled to

do business therein it is not "within its jurisdiction" so as to be entitled to raise this question.

6 R. C. L. (Tit. Const. Law), 413-415.

12 C. J. (Tit. Const. Law), 1142, 1143.

Fletcher Cyc. of Corporations, Vol. 8, p. 9455 (and cases cited).

Blake vs. McClung, 172 U. S. 239; 43 L. ed. 432, 440; 19 Sup. Ct. 165.

3. Furthermore, this provision of the Fourteenth Amendment to the Federal Constitution recognizes the right of the state to make reasonable statutory classifications. Such distinctions as the challenged portions of Secs. 4096 and 4097, Wis. Stats., make between foreign corporations on the one hand and domestic corporations or individuals on the other rest on real differences and are reasonable.

Secs. 4096 and 4097, Wis. Stats.

6 R. C. L. (Tit. Const. Law), 373, et seq.; 414, 415.

12 C. J. (Tit. Const. Law), 1144-1149.

Louisville & N. Ry. Co. vs. Melton, 218 U. S. 36; 54 L. ed. 921, 928; 30 Sup. Ct. 676; 47 L. R. A. (N. S.) 84.

St. Mary's Franco-American Petroleum Co. vs. West Virginia, 203 U. S. 183; 51 L. ed. 144, 147; 27 Sup. Ct. 132 (and authorities cited).

Consolidated Rendering Co. vs. Vermont, 207 U. S. 541; 52 L. ed. 327.

Hammond Packing Co. vs. Arkansas, 212 U. S. 322; 53 L. ed. 530, 535, 545; 29 Sup. Ct. 370.

III.

The challenged provisions of Secs. 4096 and 4097, Wis. Stats., do not contravene that portion of the Fourteenth Amendment to the Federal Constitution which forbids a state to deprive any person of life, liberty or property, without "due process of law."

1. The argument of plaintiff in error on this point.
2. Brief analysis of the challenged portions of these statutes as interpreted by the Supreme Court of Wisconsin.

   Secs. 4096 and 4097, Wis. Stats.

   Gatewood vs. North Carolina, 203 U. S. 531; 51 L. ed. 305, 309.

   Kentucky Finance Corp. vs. Paramount Auto Exchange Corp., 171 Wis. 586.

   George vs. Bode, 170 Wis. 411, 414.

   Eastern Ry. Co. vs. Tuteur, 127 Wis. 382, 410.

   Frawley vs. Cosgrove, 83 Wis. 441, 443.

3. The challenged statutes, as thus interpreted, do not contravene the "due process" requirement of the amendment.

   (1) Similar statutes are common and have been recognized by this court.

   Ch. 20, 1 Stats. L. 82; Vol. 3, Fed. Stats. Ann. (2nd ed.) Sec. 724, p. 160-161 (and cases cited).

   Hammond Packing Co. vs. Arkansas, 212 U. S. 322; 53 L. ed. 530, 535, 545; 29 Sup. Ct. 370; affirming—81 Ark. 519; 100 S. W. 407, 412; 1199.

   Consolidated Rendering Co. vs. Vermont, 207 U. S. 541; 52 L. ed. 327.

   Carpenter vs. Winn, 55 L. ed. 842.

Thompson vs. Selden, et al., 15 L. ed. 1001.
Kentucky Finance Corp. vs. Paramount Auto Exchange Corp., 171 Wis. 586, 592.

(2) Where the statute provides for notice and an opportunity to be heard, and renders the default judgment, not primarily as punishment of a party for a contempt committed, but rather as a determination of the cause against him because, by his failure to respond to the order for examination, he has raised against himself a statutory conclusive presumption of want of merit in his position, the statute does not deny such party due process of law.
Section 1770b, Sub-Division 10, Wis. Stats.
Fletcher Cyc. of Corporations, Vol. 8, pp. 9360, 9429, 9458; Vol. 9, pp. 10152-10153; 10154-10155; 10158.
Hovey vs. Elliott, 167 U. S. 409; 42 L. ed. 215; 17 Sup. Ct. 841.
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ARGUMENT.

I.

The Fifth Amendment to the Federal Constitution does not apply to the action of State Govern-

ments, but only to the action of Federal Governments. Hence, this Court will not test State Statutes by the provisions of that Amendment.

This principle was said by this court, speaking of the first ten amendments to the Federal Constitution, in the case of *Minneapolis & St. Louis Railway Company vs. Bombolis,* 241 U. S. 211-217; 60 L. ed. 961-963; 30 Sup. Ct. 595, to have been "conclusively determined" and many authorities were therein cited in support of the statement. The principle was specifically applied by this Court to the Fifth Amendment in the case of *Eising vs. Pennsylvania,* 227 U. S. 592; 57 L. ed. 658, 661; 33 Sup. Ct. 321. In view of these authorities and many similar ones, it is unnecessary to discuss further the Fifth Amendment with relation to this case.

II.

The challenged provisions of Secs. 4096 and 4097, Wis. Stats., do not contravene that portion of the Fourteenth Amendment to the Federal Constitution which forbids a state to "deny to any person within its jurisdiction the equal protection of the laws."

1. The argument of plaintiff on this point.

A study of the general discussion by plaintiff in error of the challenged statutes indicates the following to be the substance of the contention which it makes with reference to this portion of the Fourteenth Amendment as applied to these statutes:

The brief sets forth that the statutes in question require the service of a subpoena on the officers of a domestic corporation sought to be examined, and where the examination of parties residing within the state is desired requires their examination to be held

in the county of their residence; and that where the officers of a foreign corporation are examined, however, the statute requires merely that a notice of motion for such examination be given to the attorneys for the foreign corporation and allows the court to fix the time and place of the examination, which may be required within the State of Wisconsin. The contention is therefore made that these provisions of the statutes deny to a foreign corporation, such as the plaintiff in error, the equal protection of the laws of the State of Wisconsin dealing with this subject matter.

2. The Fourteenth Amendment to the Federal Constitution prohibits any state from denying equal protection of its laws to any person "within its jurisdiction." Since the plaintiff in error does not appear to have complied with the laws of Wisconsin so as to be entitled to do business therein, it is not "within its jurisdiction" so as to be entitled to raise this question.

The plaintiff in error, at pages 28, 29 and 31 of its brief, in attempting to distinguish this case from a decision of this court there cited, states that the plaintiff in error has never attempted to comply with the Statutes of the State of Wisconsin, so as to qualify as a foreign corporation to do business within that state. We understand this to be correct. Under these circumstances it is elementary that the plaintiff in error cannot be considered a person "within (the) jurisdiction" of the State of Wisconsin. If it is not "within its jurisdiction" it is not entitled to complain of a statute of that State on the ground

that such statute violates the provision of the Fourteenth Amendment which forbids the State "to deny to any person *within its jurisdiction* the equal protection of its laws."

6 R. C. L. (Tit. Const. Law), 413-415.

12 C. J. (Tit. Const. Law), 1142, 1143.

Fletcher Cyc. of Corporations, Vol. 8, p. 9455 (and cases cited).

Blake vs. McClung, 172 U. S. 239; 43 L ed. 432, 440; 19 Sup. Ct. 165.

As was said by this court in the case last cited—

> "That prohibition manifestly relates only to the denial by the state of equal protection to persons 'within its jurisdiction.' Observe that the prohibition against the deprivation of property without due process of law is not qualified by the words 'within its jurisdiction,' while those words are found in the succeeding clause relating to the equal protection of the laws. The court cannot assume that those words were inserted without any object, nor is it at liberty to eliminate them from the Constitution and to interpret the clause in question as if they were not to be found in that instrument. Without attempting to state what is the full import of the words 'within its jurisdiction,' it is safe to say that a corporation not created by Tennessee, nor doing business there under conditions that subjected it to process issuing from the courts of Tennessee at the instance of suitors, is not under the above clause of the Fourteenth Amendment within the jurisdiction of that state. * * * * It does not appear to have been doing business in Tennessee under the statute here involved, or under any statute that would bring it directly under the jurisdiction of the courts of Tennessee by service of process on its officers or

agents. Nor do we think it came within the jurisdiction of Tennessee, within the meaning of the Amendment, simply by presenting its claim in the state court and thereby becoming a party to this cause. Under any other interpretation the Fourteenth Amendment would be given a scope not contemplated by its framers, or by the people, nor justified by its language."

The foregoing applies directly to the position of the plaintiff in error and, therefore, it cannot be heard to challenge the statutes in question as violative of this clause of the Fourteenth Amendment.

3. Regardless of the determination of the foregoing contention, this provision of the Fourteenth Amendment invoked by plaintiff in error recognizes the right of the State to make reasonable statutory classifications. Such distinctions as the challenged portions of Secs. 4096 and 4097, Wis. Stats., make between foreign corporations on the one hand and domestic corporations or individuals on the other rest on real differences and are reasonable.

We here quote in full Sections 4096 and 4097, Wisconsin Statutes—

"EXAMINATIONS OF ADVERSE PARTY BEFORE TRIAL; PROCEDURE. Section 4096. 1. No action to obtain a discovery under oath, in aid of prosecution or defense of another action, shall be allowed; but the examination of the party, his or its assignor, officer, agent, or employe, or of the person who was such officer, agent, or employe, at the time of the occurrence of the facts made the subject of the examination, or in case a county, town or village, or city be a party, the examination of any officer of

such county, town, village, or city, otherwise than as a witness on a trial, may be taken by deposition at the instance of the adverse party in any action or proceeding, at any time after the commencement thereof and before judgment. As many such examinations may be had, at different times and places, as there are individuals to be examined; but no individual shall be examined more than once, except as hereinafter otherwise provided.

DEPOSITION. 2. Such deposition shall be taken before a judge at chambers or a court commissioner on a previous notice to such party, and any other adverse party or their respective attorneys of at least five days; or it may be taken without the state in the manner provided for taking other depositions. Such portions of any such examination or examinations of any of the persons mentioned as are relevant to the issues in the case may be offered by the party taking any such examination or examinations and shall be received upon the trial of the action or proceeding in which it is taken, notwithstanding the person who was so examined may be present at the trial or proceeding.

SUBPOENA. 3. The attendance of the party to be examined, and the production of all papers, books, files, records, things, and matters in the possession of such party, his or its assignors, officers, agents, or employes, relevant to the controversy, may be compelled upon subpoena and the payment or tender of his fees as a witness. If the party to be examined is a nonresident of this state, the court may upon motion fix the time and place of such examination, either within or without the state. He shall attend at such time and place and submit to the examination, and, if required, attend for the purpose of read-

ing and signing such deposition, without service of subpoena.

RULES. 4. Such examination shall be subject to the same rules as that of any other witness, but he shall not be compelled to disclose anything not relevant to the controversy.

NOTICE. 5. If such examination shall be taken before issue joined, the notice of taking the same shall be accompanied by an affidavit of the party, his agent, or attorney, stating the general nature and object of the action, that discovery is sought to enable the party to plead and the points upon which such discovery is desired, and such examination shall be limited to the discovery of the facts relevant to such points, unless the court, or the presiding judge thereof, on motion and one day's notice, shall, before the examination is begun, by order, further limit the subjects to which it shall extend; but after service of the complaint the defendant may examine the plaintiff, his or its agent, employe or officer, and the plaintiff may examine the defendant, his or its agents, employe, or officer, on all points set out in the complaint, as though the same had been put in issue; but such examination shall not preclude the right to another examination after issue joined upon all the issues in the cause, and the party examining shall, in all cases be allowed to examine upon oral interrogatories.

VENUE. 6. Such examinations shall not be compelled in any other county than that in which the party to be examined resides, except as hereinbefore provided; provided, however, that whenever plaintiff or defendant is a nonresident of this state his deposition may be had under the provisions of this section in any county in the state, if he can be personally served with notice and subpoena.

FOREIGN CORPORATION. 7. In case a foreign corporation is a party, the examination of its president, secretary, other principal officer, assignor or agent or employe, or the person who was such, or either of them, at the time of the occurrence of the facts made the subject of the examination, may be had under the provisions of this section in any county of this state. The court may also, upon motion and such terms as may be just, fix a time and place in this state for such examination of any of said persons. Such persons so sought to be examined as aforesaid shall attend at such time and place and submit to the examination, and then and there have with him all papers, books, files, records, things, and matters in the possession of such person by reason of his relation to such corporation, relevant to the controversy. Such person sought to be examined as aforesaid shall attend at such time and place and submit to the examination, and, if required, attend for the purpose of reading and signing such deposition, without service of subpoena.

CONTEMPT. 8. In any examination under these provisions, the judge or commissioner before whom the same is had may compel the party examined to answer all questions relevant to the issues involved and also compel the production by him of books and papers relevant and pertinent to the issues and may enforce such answers and the production of such books and papers by contempt proceedings.

STIPULATION WAIVING READING AND SIGNING. 9. Whenever a party shall be examined and his deposition taken under the provisions of this section the party taking such examination and the party examined, or their counsel, may stipulate upon the record before the

judge or court commissioner before whom the examination is had, that the reading of the deposition to or by the deponent and his signature thereto are waived by consent, and that the deposition may be used with the same force and effect as if read over and signed; and in cases where such stipulation is made the said examination or deposition may be used in the action in which the same is taken and in any other action or proceeding in that or in any other court where it could have been used if read over and signed, with the same force and effect in all respects as if the deponent had read and signed the same.

SIGNING; TRANSMITTAL. 10. In all cases where the reading and signature shall not be waived as aforesaid, the said deposition shall be read over to or by the deponent and signed by him before the officer before whom the same was taken, and the attendance of the party examined for the purpose of reading and signing said deposition may be compelled in the same manner as his attendance for the purpose of submitting to such examination may now be compelled by law. It shall in all cases be delivered or transmitted by the officer before whom taken to the clerk of the court, magistrate or other person before whom the action or proceeding is pending securely sealed, and shall remain sealed until opened by the court or clerk thereof or such magistrate or other person.

PENALTY FOR NOT TESTIFYING. Section 4097. 1. If any party lawfully required to appear and testify, as provided in this chapter, either within or without the state, shall neglect or refuse so to do, he may be punished as for a contempt and his pleading be stricken out and judgment given against him as upon default or failure of proof.

2. If any officer, agent, or employe, or any person who was such officer, agent, or employe of a foreign corporation, at the time of the occurrence of the facts made the subject of the examination, be lawfully required to appear and testify, as provided in this chapter, either within or without the state, shall neglect or refuse so to do; or, if such person, when lawfully required, shall refuse and neglect to have with him any papers, books, files, records, things and matters in the possession of such party relevant to the controversy, such party may be punished as for a contempt and in the discretion of the court, the pleading of such foreign corporation stricken out, and judgment given against it as upon default or failure of proof."

It is apparent from an examination of these statutes that they require service of subpoena upon residents of the State of Wisconsin sought to be examined, including officers of domestic corporations. Where, however, the officers of a foreign corporation are desired to be examined, the party desiring examination makes a motion before the trial court in the cause in question, giving notice thereof to the foreign corporation through its attorneys. This motion is heard in the ordinary manner and if the court determines to allow the examination, and to have it held within the State of Wisconsin, a time and place for such hearing is fixed by the order made by the trial court as its determination of such motion. It thereupon becomes the duty of the person to be examined to appear at the time and place in question and submit to the examination. The reason for the distinction with reference to the service of a subpoena is, of course, evident. The officers of a foreign cor-

poration are not within the state or the jurisdiction of the trial court and are outside the reach of its subpoena. They can be notified, if at all, only through the attorneys whom the foreign corporation party has itself chosen to represent it in the litigation instituted in the State of Wisconsin. The distinction thus made by the statute is not only reasonable, but necessary and indeed inevitable.

When a resident of the state is to be examined, his examination must take place in the county of his residence, whereas in the case of a foreign corporation the court may fix a time and place for the examination within the State of Wisconsin. The reason for this distinction is also apparent. Neither the foreign corporation nor its officers have any county of residence within the State of Wisconsin; hence the court must specify the place of examination, if it is to be held within the state. That is particularly true of a corporation like the plaintiff in error, which has never qualified as a foreign corporation to entitle it to do business in the State of Wisconsin, or, so far as the record shows, engaged in any business within that State.

It is, of course, well settled that the provision of the Fourteenth Amendment forbidding the denial by state legislation of equal protection by its laws to persons within its jurisdiction does not prevent the state from making reasonable classifications based upon actual differences with reference to the subject of its legislations.

6 R. C. L. (Tit. Const. Law), p. 373, et seq.; 414, 415.

12 C. J. (Tit. Const. Law), p. 1144-1149.

Hammond Packing Co. vs. Arkansas, 212 U. S. 322; 53 L. ed. 530, 535, 545; 29 Sup. Ct. 370.

St. Mary's Franco-American Petroleum Co. vs. West Virginia, 203 U. S. 183; 51 L. ed. 144, 147; 27 Sup. Ct. 132.

Louisville & N. Ry. Co. vs. Melton, 218 U. S. 36; 54 L. ed. 921, 928; 30 Sup. Ct. 676; 47 L. R. A. (N. S.) 84.

Consolidated Rendering Co. vs. Vermont, 207 U. S. 541; 52 L. ed. 327.

The statutory scheme expressed in Sections 4096 and 4097, so far as they provide a special procedure in reference to foreign corporation, comes clearly within the rule as enunciated by these authorities and presents instances of reasonable classification, without which, in fact, no effective remedy similar to that provided by these sections could be given in the case of foreign corporations.

Indeed, it can with justice be urged that if this method of procedure with reference to foreign corporations were not provided substantially, as outlined in these statutes, a foreign corporation which sought a Wisconsin court in which to litigate its rights would possess a distinct and unfair advantage over domestic corporations and individual citizens who were litigants in the Wisconsin courts, in that the foreign corporations would possess immunity from the provisions of these sections (so far as examinations at the place of the forum are concerned), while the domestic corporation or individual citizen of the state would be subject to them. This inequality might well manifest itself with respect to a domestic corporation or an individual brought into a Wisconsin

court in a suit instituted by a foreign corporation, such as the plaintiff in error.

We submit, therefore, that even if the plaintiff in error were in a position to challenge these statutes of the State of Wisconsin on the ground that they denied to it equal protection of the laws, it has not shown that they are subject to the criticism made. The difference in treatment of foreign corporations and domestic corporations or residents of the state are reasonable, necessary and eminently fair and just.

III.

The challenged provisions of Secs. 4096 and 4097, Wis. Stats., do not contravene that portion of the Fourteenth Amendment to the Federal Constitution which forbids a state to deprive any person of life, liberty or property, without "due process of law."

1. **Argument of the plaintiff in error on this point.**

Plaintiff in error bases practically its entire argument on this point on the decisions of this court in the case of *Hovey vs. Elliott,* 167 U. S. 409; 42 L. ed. 215; 17 Sup. Ct. 841, and the later case of *Hammond Packing Co. vs. Arkansas,* 212 U. S. 322; 53 L. ed. 530; 29 Sup. Ct. 370. The contention is that because no notice was served upon the plaintiff corporation and no process was served upon its officers sought to be examined and because thereafter, on its refusal to appear at the time and place within the State of Wisconsin designated by the trial court for the holding of the examination, its complaint in the cause was stricken and judgment given against it as upon a default, it was denied due process of law, particularly under the doctrine of the *Hovey* case. It is urged in this connection that, while the *Hovey* case dealt

with an individual party, there is no distinction, so far as its rights in this regard are concerned, between an individual and a foreign corporation, since both are citizens of the state of their residence; and that, therefore, the plaintiff is in a position to assert and the court required to hold that these statutes have operated to deny it due process of law in the instant case.

In order to answer these contentions, it is necessary at the outset to examine the provisions of Sections 4096 and 4097 as interpreted by the Supreme Court of Wisconsin.

2. **Brief analysis of the challenged portions of these statutes as interpreted by the Supreme Court of Wisconsin.**

For convenience we quote here again certain portions of the statutes:

It is provided in Subdivision 7, Section 4096, as follows:

> "In case a foreign corporation is a party, the examination of its president, secretary, other principal officer, assignor or agent or employe, or the person who was such, or either of them, at the time of the occurrence of the facts made the subject of the examination, may be had under the provisions of this section in any county of this state. The Court may also, upon motion and such terms as may be just, fix a time and place in this state for such examination of any of said persons. Such persons so sought to be examined as aforesaid shall attend at such time and place and submit to the examination, and then and there have with him all papers, books,

files, records, things, and matters in the possession of such person by reason of his relation to such corporation, relevant to the controversy. Such person sought to be examined as aforesaid shall attend at such time and place and submit to the examination, and, if required, attend for the purpose of reading and signing such deposition, without service of subpoena."

Subdivision 2 of Section 4097 must be read in connection with the foregoing, and provides as follows:

"If any officer, agent, or employe, or any person who was such officer, agent, or employe of a foreign corporation, at the time of the occurrence of the facts made the subject of the examination, be lawfully required to appear and testify, as provided in this chapter, either within or without the state, shall neglect or refuse so to do; or, if such person, when lawfuly required, shall refuse and neglect to have with him any papers, books, files, records, things, and matters in the possession of such party relevant to the controversy, such party may be punished as for a contempt and in the discretion of the court, the pleading of such foreign corporation stricken out, and judgment given against it as upon default or failure of proof."

These are companion sections of portions of Subdivision 3 of Section 4096 and Subdivision 1 of 4097 providing a similar remedy with reference to the examination of individual nonresidents of the State of Wisconsin.

Since this court in passing upon this statute will, of course, accept the interpretation of it given by the Supreme Court of the State of Wisconsin (*Gatewood vs. North Carolina,* 203 U. S. 531; 51 L. ed. 305, 309)

it becomes important to ascertain the construction which the Supreme Court of the State of Wisconsin has placed upon these provisions. Over thirty years ago the Supreme Court of Wisconsin said with reference to these statutes:

> "This Court has frequently held that the examination thus authorized was intended as a substitute for a bill of discovery under the old practice, and, being remedial, should be liberally construed (citing cases). The object of the section was to abolish not only the form but also the substance of the old bill of discovery and to enable the party to obtain the benefits of the bill and also a more ample remedy by taking the deposition of the adverse party as a witness in the case upon all questions involved in the issues." *Frawley vs. Cosgrove,* 83 Wis. 441, 443.

In the later case of *Eastern Ry. Co. vs. Tuteur,* 127 Wis. 382, 410, the Supreme Court held with reference to the provisions of Section 4097 providing for the striking out of a pleading and the granting of judgment on default for failure or refusal to testify, that such an application was always addressed to the discretion of the court and in the exercise of that discretion the court had broad latitude to do what justice required upon the facts of the case before it.

In *George vs. Bode,* 170 Wis. 411, 414, the court in passing upon the provision authorizing the trial court to fix a time and place within the State of Wisconsin for the examination of a nonresident party said:

> "This makes it clear that the legislative idea now is to leave it in the discretion of the trial judge to say whether a nonresident be examined in this State or at his domicile."

In the case now sought to be reviewed *(Kentucky Finance Corporation vs. Paramount Auto Exchange Corporation, supra)* the last paragraph of the decision shows clearly that the Supreme Court of the State of Wisconsin construed these statutes as authorizing and requiring the exercise of a reasonable judicial discretion as to whether under the circumstances of a particular case the examination of a nonresident should be directed to be held in the State of Wisconsin or at the residence of the party to be examined; also that an order made under Section 4097, striking out a pleading and granting judgment as upon a default, must not be arbitrary or oppressive, or "require the party to do that which is not its power or ability to do," and that if the order made violated these requirements it could and would be set aside or reversed by the Supreme Court of Wisconsin on appeal.

The foregoing principles, therefore, must be taken as established as fully with reference to the statutes in question, as if they had been expressly written into the statutes by the legislature.

3. The challenged statutes, as thus interpreted, do not contravene the "due process" requirement of the Amendment.

(1) Similar statutes are common and have been recognized by this court.

As this court said in the case of *Hammond Packing Co. vs. Arkansas,* 212 U. S. 322; 53 L. ed. 530, 535, 545; 29 Sup. Ct. 370.

> "As pointed out by the court below, the law of the United States, as well as the laws of many

of the states, afford examples of striking out pleadings and adjudging by default for a failure to produce material evidence, the production of which has been lawfully called for. U. S. Rev. Stat. Par. 724, which was drawn from Par. 15 of the judiciary act of 1789 (1 Stat. at L. 82, chap. 20, U. S. Comp. Stat. 1901, p. 583), after conferring upon courts of laws of the United States the authority to require parties to produce books and writings in their possession or under their control which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery, expressly empowers such courts, if a plaintiff fails to comply with the order, to render a judgment of nonsuit, and, if a defendant fails to comply, 'the court may, on motion, give judgment against him by default.' From the time of this enactment, practically coeval with the Constitution, although controversies have arisen as to its interpretation, no contention, so far as we can discover, has ever been raised questioning the power given to render a judgment by default under the circumstances provided for in the statute. Its validity was taken for granted by the court, speaking through Mr. Chief Justice Taney, in Thompson vs. Selden, 20 How. 194, 15 L. ed. 1001, and this was also assumed by the court, speaking through Mr. Justice Bradley, in Boyd vs. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, where the effect of the constitutional guaranties embodied in the 4th and 5th Amendments was elaborately and lucidly expounded. It is unnecessary to cite the many cases in the lower Federal courts which manifest the same result, as they will be found collected in Gould & Tucker's Notes on the Revised Statutes, under Par. 724, and in the notes to the

same section, contained in volume 3, Federal Statutes Annotated.

"And, beyond peradventure, the general course of legislation and judicial decision in the several states indicates that it has always been assumed that the power existed to compel the giving of testimony or the production of books and papers by proper regulations prescribed by the legislative authority, and, for a failure to give or produce such evidence, the law might authorize a presumption in a proper case against the party refusing, justifying the rendering of a judgment by default, as if no answer had been filed. While it may be true that, in some of the state statutes passed on the subject, and in decisions applying them, some confusion may appear to exist, resulting from confounding the extent of the authority to punish as for a contempt and the right to engender a presumption relative to proof arising from a failure to give or produce evidence, it is accurate to say that, when viewed comprehensively, the statutes and decisions in effect recognize the difference between the two, and therefore may be substantially considered as but an exertion by the states of a like power to that which was conferred upon the courts of the United States by the original judiciary act and by Revised Statutes, Par. 724.

"Without referring in detail to the various statutes, which will be found collected as of the year 1896 in 6 Enc. Pl. & Pr. note 3, pp. 812 et seq., we content ourselves with saying that the laws of Indiana, Iowa, Mississippi, Massachusetts, Missouri, New Hampshire, Texas, and Washington aptly portray the subject."

Besides the authorities cited in this quotation, we refer to the following cases as recognizing similar statutes:

Consolidated Rendering Co. vs. Vermont, 207 U. S. 541; 52 L. ed. 327.

Carpenter vs. Winn, 55 L. ed. 842.

Hammond Packing Co. vs. Arkansas, 81 Ark. 519; (100 S. W.) 407, 412; 1199.

Kentucky Finance Corp. vs. Paramount Auto Exchange Corp., 171 Wis. 586, 592.

A quite complete examination of this point is contained in the brief of the defendant in error in the case of *Hammond Packing Co. vs. Arkansas, supra,* as filed in this Court.

(2) **Where such a state statute provides for notice and an opportunity to be heard and allows a rendition of the default judgment, not primarily as a punishment of a party for a contempt committed, but rather as a determination of the cause against him because, by his failure to respond to the order for examination, he has raised against himself a statutory conclusive presumption of want of merit in his position, the statute does not deny such party due process of law.**

In the case of *Hovey vs. Elliott, supra,* on which plaintiff in error bases very largely the contentions advanced in its brief as to denial of due process of law, the court was not proceeding under a statutory grant of authority, but under the inherent power of the court. In that case it struck out the pleading of a defendant and allowed judgment to go against him by default as a punishment for the alleged contempt committed by such party by refusing to pay in said court a sum of money which the court had directed him to deposit. We mention the absence of a statu-

tory enactment not that it makes any difference in principle between the two cases, but as a proof that the order in the *Hovey* case was imposed purely and simply upon the basis of punishment for the alleged contempt. This court held that the striking out of the pleading and the granting of judgment by default in that case *as punishment for a contempt committed* denied to the defendant therein due process of law as guaranteed by the Fourteenth Amendment.

In the case of *Hammond Packing Co. vs. Arkansas, supra,* the court also struck out the pleading of a defendant and permitted judgment to go against it by default. In that case, however, the action was taken pursuant to a statute of the State of Arkansas, which in effect, as interpreted by this court, vested the authority to make the order in question in the trial court *not as punishment for a contempt,* but because the defendant had raised against itself a conclusive presumption of want of equity in its position, created by the statute, and resting upon its refusal to appear at the designated time and place to produce certain evidence.

As this court said in the case of *Hammond Packing Co. vs. Arkansas, supra,* (53 L. ed. p. 545):

> "Hovey vs. Elliott involved a denial of all right to defend as *a mere punishment.* This case (the Hammond case) presents a failure by the defendant to produce what we must assume was material evidence in its possession, and a resulting striking out of an answer and a default. The proceeding here taken may, therefore, find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be

gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in Hovey vs. Elliott, and the power exerted in this, is as follows: 'In the former due process of law was denied by the refusal to hear. In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other. In its ultimate conception, therefore, the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering, and might well also be illustrated by reference to many other presumptions attached by the law to the failure of a party to a cause to specially set up or assert his supposed rights in the mode prescribed by law."

This distinction is peculiarly applicable to the challenged statutes of the State of Wisconsin. It will be noted by reference to Subdivision 2 of Section 4097 that the language of the latter portion of that subdivision specifically distinguishes between punishment for the contempt on the one hand and the creation of the statutory presumption above referred to

by this court on the other. It provides with reference to a foreign corporation which has refused to comply with the order that "such party may be punished *as for a contempt, and in the discretion of the court* the pleading of such foreign corporation stricken out, and judgment given against it as upon default or failure of proof." It is clear, therefore, that the punishment for contempt is designed to be imposed directly upon the person failing to appear and testify, and to be thus imposed by a specific order defining the punishment. The court may, however, go further wherever in its judgment and discretion it appears to the court to be proper to apply and enforce the statutory presumption. In all such cases the court may treat the recalcitrant party as having admitted the want of merit in its position and, upon such admission and the resulting statutory presumption, may treat it as a party in default and permit judgment to go against it as if it had wholly failed to produce proof in support of its pleading. This latter, however, is purely an additional and cumulative remedy which the court may or may not apply, as the circumstances appear to require. It is wholly severed from the penalty for contempt and is no part thereof.

Therefore, the Wisconsin statutes in this respect come clearly within the distinction pointed out by this court in the case of *Hammond Packing Co. vs. Arkansas, supra,* and are free from the infirmity which this court found in the order of the trial court in the *Hovey* case.

Furthermore, the contention of the plaintiff in error that the challenged statutes do not afford to it due process of law, because they do not afford a prop-

er notice or hearing, is absolutely untenable. This is well illustrated by this very case. In the first place the plaintiff in error was given the regular statutory notice of the motion of the defendant to be permitted to examine the secretary of the plaintiff corporation within the State of Wisconsin. The plaintiff in error appeared on the argument of that motion and was heard fully in opposition to the same. The court ordered the examination to be heard at a time and place within the State of Wisconsin fixed by the order. The plaintiff in error had due notice of this order and by letter, which was made a part of record in this case (Transcript, pp. 29 and 30), formally refused to comply with the order of the trial court *in any respect.* Thereupon the defendant brought on for hearing, upon regular statutory notice, a second motion requesting that the pleading of the plaintiff in error be stricken and judgment go against it by default, as provided by Section 4097, Wisconsin Statutes. It should be noted with reference to this motion that it did not even request the punishment of any one for contempt (Transcript, pp. 31 and 32). The plaintiff in error again appeared and was heard fully in opposition to this motion, and at the close of the hearing the order now sought to be reviewed was made. The plaintiff in error appealed from both of these orders to the Supreme Court of the State of Wisconsin and has brought to this court by writ of error the decision of the Supreme Court of Wisconsin affirming these orders. It is difficult, indeed, in view of the rights accorded to a nonresident corporation by the challenged statutes, and especially in view of the full extent to which the plaintiff in

error availed itself of those rights in this case, to understand how it can now be asserted that these statutes either permit the denial to a party of the opportunity to be heard or have so operated in the instant case.

One other contention of plaintiff in error should be noted. Plaintiff in error asserts that while the *Hovey* case dealt with an individual nonresident there is no difference in principle between an individual nonresident and a foreign corporation with respect to the operation of the due process clause of the Fourteenth Amendment. It is our contention that in this plaintiff in error is not correct.

As this court said in the case of *Blake vs. McClung,* 172 U. S. 239; 43 L. ed. 432, 440; 19 Sup. Ct. 165:

> "It has long been settled that, for purposes of suit by or against it in the courts of the United States, the members of a corporation are to be conclusively presumed to be citizens of the State creating such corporation (citing many authorities); and, therefore, it has been said that a corporation is to be deemed for such purposes a citizen of the State under whose laws it was organized, but it is equally well settled, and we now hold, that a corporation is not a citizen within the meaning of the constitutional provision 'that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states'." (Citing cases.)

The reason for this distinction was pointed out in the case of *Paul vs. Virginia,* 8 Wall. 168, 19 L. ed. 357, 360. It was there said that the privileges and immunities secured by this provision of the Constitution to citizens of each state in the several states,—

> "are those privileges and immunities which are common to the citizens in the latter state under their constitution and laws by virtue of their being citizens."

It is then pointed out that this does not include special privileges, and the privilege conferred by the corporate franchise is essentially in the class of such special privileges. Hence a corporation is not included in the statutory guaranty in question. Therefore, a foreign corporation not licensed to do business in the State of Wisconsin stands in a very different position than a citizen of a foreign state, so far as access to its courts is concerned. This court early recognized the right and general power of a state to restrict a foreign corporation in entering its boundaries even for the purpose of instituting suit. While that right is ordinarily freely accorded by comity, it is a right which the state may withhold, regulate, or restrict.

As this court said in the case of *Anglo-American Provision Co. vs. Davis Provision Co.*, 48 L. ed. (U. S.) 225:

> "The general power of a state to restrict the right of a foreign corporation to sue in its courts is assumed in *Bank of Augusta vs. Earle*, 13 Pet. 519, 589-591; 10 L. ed. 274, 308, 309."

In the latter case, while the court is, of course discussing mainly the right of a foreign corporation to do business in other states by virtue of comity, it declares that there is a "comity of suit" which is strictly comparable in principle to the "comity of contract" with which the decision is mainly concerned. Text writers have recognized this same principle.

Fletcher Cyc. of Corporations, Vol. 8, pp. 9360, 9429, 9458; Vol. 9, pp. 10152-10153; Sec. 5592, pp. 10154-10155, 10158.

12 R. C. L. (Tit. Foreign Corporations), p. 99.

In the case of *American Food Products Co. vs. American Milling Co.,* 151 Wis. 385-395, it was said:

> "That the privilege accorded to foreign corporations to sue in this state rests on comity and therefore is subject to such terms as the state may impose is well established * * *" (Citing many authorities).

It follows from these authorities, therefore, that a nonresident individual and a foreign corporation litigant in the courts of Wisconsin do not stand on the same basis in respect to this right of the state to impose restrictions. A foreign corporation is permitted to enter the State of Wisconsin for the purpose of instituting an action in its courts only under principles of comity strictly analogous to those under which it is permitted to enter the state and conduct its business therein. No principle is better recognized or has been more frequently announced by this court than that, as regards the latter right, it is subject to such restrictions as the legislatures of the individual states may see fit to impose, even to the extent of entire exclusion of a foreign corporation. The fact that the right to bring suit in courts of another jurisdiction has been so commonly and freely accorded to foreign corporations has caused us perhaps to lose sight of the fact that that right depends upon the same form of comity as does the right to conduct its business elsewhere than in the state of its creation; and that, therefore,

the right thus to institute suit is subject to state regulation.

The State of Wisconsin has indeed announced a legislative policy with reference to corporations entering its borders for purposes of doing business, wherein it is sought to place them on a basis of absolute equality so far as practicable with corporations which it has itself created. It has said that:

> "All foreign corporations and officers and agents thereof doing business in this State shall be subjected to all the liabilities and restrictions that are, or may be imposed upon corporations of like character, organized under the laws of this State, and shall have no other or greater powers." (Sec. 1770b, subd. 10, Wis. Stats.)

While this language does not, of course, apply to the plaintiff in error, as it was not conducting its business in the State of Wisconsin, it certainly will not be heard to complain if the State of Wisconsin says to it, as it has said in Sections 4096 and 4097, that if it desires to avail itself of the comity of the State of Wisconsin to enter the courts of its jurisdiction and commence a suit therein against a resident of the State of Wisconsin, it shall be subjected to a liability comparable to that which would rest upon a domestic corporation of the State of Wisconsin which brought a similar suit in the same court. A domestic corporation which brought such a suit would subject itself to examination in the state of the forum under the challenged statutes. The State of Wisconsin says, by these statutes, to a foreign corporation: If you desire to avail yourself of permission to sue citizens of Wisconsin in the courts of Wis-

consin you must subject yourself to a similar liability. If the person or corporation whom you bring into the court as a defendant finds it necessary to invoke the remedy provided in Section 4096 against your officers or agents, it shall have the authority to do so. The defendant shall not be required to serve process on the officer or agent sought to be examined because such officer or agent is out of reach of the process of the court. The place of the examination is to be fixed by the court, and it will be conclusively assumed that the court will weigh the evidence as to the situation of parties litigant, and will fix the place of the examination in the State of Wisconsin only where it appears fair and just upon all the facts that it be fixed there, rather than at the place of residence of the foreign corporation. And certainly a foreign corporation litigant is in no position to complain of such an order.

The court will not require (as plaintiff in error suggests in its brief) the examination of a former officer or agent of the foreign corporation, if it appears on the hearing that the circumstances are such that such former officer or agent is no longer sufficiently under the control of the foreign corporation to enable it to procure the presence of such person for such examination; and if an order should be made for the examination of such former officer or agent and the foreign corporation is unable to procure his presence at the time and place requested, the court will certainly not strike out the pleading of the foreign corporation, where it appears that it has been impossible for it to produce the party thus sought to be examined.

All of these provisions, therefore, of the challenged statutes are simply so many conditions attached by the State of Wisconsin to the extension by this state of the "comity of suit" in its courts to a foreign corporation. They are reasonable, necessary and just provisions and are not subject to any of the challenges embodied in the brief of the plaintiff in error.

It is therefore, submitted that Sections 4096 and 4097, Wisconsin Statutes, should be held valid enactments and the decision of the Supreme Court of the State of Wisconsin should be affirmed.

Respectfully submitted,

Walter H. Bender

Of counsel for defendant in error.

No. 156. 17

IN THE

Supreme Court of the United States

October Term, 1921.

KENTUCKY FINANCE CORPORATION,

Plaintiff in Error,

vs.

PARAMOUNT AUTO EXCHANGE CORPORATION,

Defendant in Error.

Reply Brief of Plaintiff in Error

JACKSON B. KEMPER,
ALBERT K. STEBBINS,
Counsel for Plaintiff in Error.

Wetzel Bros. Printing Co., Milwaukee

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Reply Brief of Plaintiff in Error

In our principal belief we considered chiefly the effect of Section 4096 of the Statutes of Wisconsin upon parties litigant being domestic or foreign corporations.

The Section, however, affects directly the rights of individuals being officers, agents and employees, or former officers, agents and employees, of such corporation.

In the consideration of the section from this point of view we are first confronted with the anomolous situation that a non-resident officer of a domestic corporation can in no way be subjected to an examination under its provisions (as they were at the

time of the entry of the order in the case at bar) within the State of Wisconsin, unless found within said state and served with a subpoena.

Counsel for defendant in error, in his brief (page 12), has mistakenly quoted Subdivision 3 of this section. At the time of the entry of the order here the words "either within or without the state," at the end of the second sentence in that subdivision, did not appear, the sentence reading,—"If the party to be examined is a non-resident of this state the court may, upon motion, fix the time and place of such examination," (Brief Plaintiff in Error, Page 6), which was immediately limited and explained by Subdivision 6, which provided,—

> "VENUE. 6. Such examinations shall not be compelled in any other county than that in which the party to be examined resides, except as hereinbefore provided; provided, however, that whenever plaintiff or defendant is a non-resident of this state his deposition may be had under the provisions of this section in any county in the state, if he can be personally served with notice and subpoena." (Brief Plaintiff in Error, Page 8).

The words "either within or without the state" added by the 1919 Legislature to Subdivision 3 of Section 4096, as above noted, clearly were intended to so amend Subdivision 6 as to compel the attendance of non-resident natural persons being parties to the action, and non-resident officers of domestic corporations, before a Court Commissioner in Wisconsin in the same manner as officers of foreign corporations under Subdivision 7, here in controversy. This amendment, being subsequent to the order here

under review, is immaterial, but, having been brought to the attention of the court by defendant in error, may be noted as a clearly unconstitutional act and as indicative of the general attitude of the Wisconsin Legislature toward non-resident litigants.

Taking, however, the law as it then existed, we may properly consider its effect upon citizens of Wisconsin and citizens of the other states of the union, being officers of foreign corporations.

Corporate rights and privileges, within certain well-defined limits, may be restricted by the laws of states other than the one of incorporation; such corporate rights may be readily defined, but can be no other than those essentially possessed by the corporation itself, as an entity, and must relate to the functioning of the corporation as such.

By becoming an officer of a corporation a citizen surrenders none of his rights or privileges of citizenship, nor is his identity lost in that of the corporation of which he is an officer; his personal rights are the same in any state of the union in which he may be found, and they are in no manner subject to abridgement by the act of any state legislature.

A citizen of New York (even though he may be an officer of a corporation organized under the laws of that state) summoned to testify as a witness in Wisconsin, may not legally be subjected to discrimination or required to conform to rules to which a citizen of Wisconsin is not subjected.

A resident of Wisconsin may under no circumstances be compelled to testify in any county other than that in which he resides (Subd. 6, supra).

A resident of a sister state may, if found within Wisconsin, and not otherwise, be served with a subpoena and compelled to testify as a witness within the state (Subd. 6, supra).

A resident of a sister state may be required to give his deposition as an adverse witness without the state of Wisconsin in the same manner as depositions are taken in other cases (Subd. 2 Brief Plaintiff in Error, Page 7).

These remedies are exclusive and exhaust the power of a litigant to examine an adverse witness by way of discovery before trial, unless such witness is also an officer of a so-called foreign corporation, in which event he may, as an individual, be compelled to respond and forced to come from a distant state and submit to an examination within Wisconsin upon "such terms as may be just," which as a practical proposition, as in the case at bar, means the statutory per diem witness fees and mileage from the state line of Wisconsin and return to said line.

It is the individual citizen who must appear in Wisconsin and submit to an adverse examination upon the receipt of nominal and grossly inadequate fees, without even the service of process. The penalty of a stricken pleading and adverse judgment in case of his failure to attend may fall upon the corporation of which he is an officer, but it is the citizen who is subjected to the inconvenience and forced to pass through the ordeal of an examination in a county other than that in which he resides—to which a resident of Wisconsin is not required to submit—and this although the statute offers the reasonable alternative

of securing his testimony at his home "in the manner provided for taking other depositions."

It is respectfully submitted that the provision for the taking of the adverse examination of an officer of a foreign corporation *without* the state "in the manner provided for taking other depositions" sufficiently protects the proper interests of all parties litigant, while the provisions of Subdivision 7 of Section 4096 are unnecessary, do not constitute due process of law, and as such are in violation of the Fourteenth Amendment.

JACKSON B. KEMPER,
ALBERT K. STEBBINS,
Counsel for Plaintiff in Error.

Reversed.

KENTUCKY FINANCE CORPORATION *v.* PARAMOUNT AUTO EXCHANGE CORPORATION.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 17. Argued October 5, 1922.—Decided June 11, 1923.

1. A corporation which goes into a State other than that of its creation for the lawful purpose of repossessing itself, by a permissible action in her courts, of specific personal property unlawfully taken out of its possession elsewhere and fraudulently carried into that State, is a person within the jurisdiction of that State, within the meaning of the Fourteenth Amendment, for all the purposes of that undertaking, and entitled to the equal protection of the laws. P. 549.
2. As applied to such a case, a statute under which the foreign corporation, not domesticated or doing business in the State, or having property there other than that so sought to be recovered, may be compelled, as a condition to the maintenance of its action, to send its officer, with its papers and books bearing on the matter in controversy, from its domicile to the State where the action is brought, in order to submit to an adversary examination before answer, but which does not subject non-resident individuals to such

examination, except when served with notice and subpoena within the State, and then only in the county where service is had, and which limits such examinations, in the case of residents of the State, individual or corporate, to the county of their residence, violates the Equal Protection Clause. *Id.*

171 Wis. 586, reversed.

ERROR to a judgment of the Supreme Court of Wisconsin, sustaining two orders, one for examination of the plaintiff before answer, and the second striking out its complaint and dismissing its action for failure to comply with the first.

Mr. Albert K. Stebbins, with whom *Mr. Jackson B. Kemper* was on the brief, for plaintiff in error.

Mr. Walter H. Bender for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

The plaintiff in error, a Kentucky corporation, brought an action of replevin in a state court at Milwaukee, Wisconsin, against the defendant in error, a Wisconsin corporation, to recover an automobile,—the right of recovery asserted in the complaint being put on the ground that the plaintiff was the owner and entitled to the possession of the automobile, that one Allen had unlawfully taken it from the plaintiff's possession at Louisville, Kentucky, had fraudulently removed it to Milwaukee and had there wrongfully delivered it to the defendant and that the defendant was unjustly withholding it from the plaintiff under some groundless claim derived from Allen. The defendant appeared and obtained from the court an order requiring the plaintiff's secretary, who resided at Louisville and was in the plaintiff's service there, to appear in Milwaukee at a fixed time before a designated court commissioner, to bring with him all papers, files and records of the plaintiff which were under his control and relevant

to the controversy, and then and there to submit to an examination by the defendant. The order was sought and granted on the ground that the examination would better enable the defendant to plead to the complaint, which as yet it had not done. The plaintiff was not engaged in any business in Wisconsin, nor had it complied with the law of that State prescribing conditions on which it might do so. It had no property in the State other than the automobile and it had gone into the State only for the purpose of instituting and prosecuting the action to repossess itself of that vehicle. Its secretary was not within the State; nor did it have any representative there other than the attorneys who were prosecuting the action in its behalf. For itself and its secretary it consented that such an examination as was sought might be had at Louisville at any time, and before any officer, the court might designate, but it objected to any order requiring that the examination be had in Milwaukee. The objection was overruled and the court put in the order a direction that the defendant tender to the plaintiff for its secretary the railroad fare from the southern boundary of Wisconsin to Milwaukee and return, being $4.74, and one day's witness fee, being $1.50. The tender was made and declined and the secretary, with the plaintiff's approval, refused to comply with the order. Because of this the court, on the defendant's motion and over the plaintiff's objection, made a further order striking the plaintiff's complaint from the files and dismissing its cause of action with costs. On appeal to the Supreme Court of the State both orders were sustained over the plaintiff's contention that they and the statute under which they were made violate the due process and equal protection clauses of the Fourteenth Amendment. 171 Wis. 586. To obtain a review of the judgment of the Supreme Court the case was brought here on writ of error under § 237 of the Judicial Code.

The statutory provisions whose validity is questioned are parts of a procedural measure, embodied in the 1917 edition [1] of the Wisconsin Statutes, abrogating prior modes of obtaining a discovery under oath and providing for an adversary examination of a "party, his or its assignor, officer, agent, or employe, or of the person who was such officer, agent, or employe, at the time of the occurrence" involved,—the examination to be had at any time after the case is begun and to take the form of a deposition "upon oral interrogatories" and be transmitted to the court like other depositions. The provisions in question are subdivision 7 of § 4096 and subdivision 2 of § 4097, which read as follows:

"In case a foreign corporation is a party, the examination of its president, secretary, other principal officer, assignor or agent or employe, or the person who was such, or either of them, at the time of the occurrence of the facts made the subject of the examination, may be had under the provisions of this section in any county of this state. The court may also, upon motion and such terms as may be just, fix a time and place in this state for such examination of any of said persons. Such persons so sought to be examined as aforesaid shall attend at such time and place and submit to the examination, and then and there have with him all papers, books, files, records, things, and matters in the possession of such person by reason of his relation to such corporation, relevant to the controversy. Such person sought to be examined as aforesaid shall attend at such time and place and submit to the examination, and, if required, attend for the purpose of reading and signing such deposition, without service of subpoena."

[1] After the proceedings in the Milwaukee court some changes were made in this procedural measure, but the changes do not affect the orders in question.

"If any officer, agent, or employe, or any person who was such officer, agent or employe of a foreign corporation, at the time of the occurrence of the facts made the subject of the examination, be lawfully required to appear and testify, as provided in this chapter, either within or without the state, shall neglect or refuse so to do; or, if such person, when lawfully required, shall refuse and neglect to have with him any papers, books, files, records, things, and matters in the possession of such party relevant to the controversy, such party may be punished as for a contempt and in the discretion of the court, the pleading of such foreign corporation stricken out, and judgment given against it as upon default or failure of proof."

When the order for the examination was made other parts of the statute, applicable to all suitors other than foreign corporations, provided, notably subdivisions 3 and 6 of § 4096, that where the party against whom the examination was sought was a resident of the State the examination could be had only in the county of his residence, and where the party was a non-resident the examination could be had in the State only if he could be personally served therein with notice and subpoena and then only in the county where such service was had. In *George* v. *Bode*, 170 Wis. 411, the Supreme Court of the State held that an examination within the State could not be ordered against a party, other than a foreign corporation, residing outside and on whom personal service could not be had therein, the court saying in that connection: "The examination may be taken in this State *if* he can be personally served with notice and subpoena; the inevitable inference is that it is only if he can be so served that he can be so examined. If the provisions of sub. 3 meant that the court might fix a time and place for his examination within this State regardless of the personal service of notice and subpoena, then the pro-

visions of sub. 6 regarding nonresidents would be wholly unnecessary. These considerations move us to construe the statute as not empowering the court to order the examination of a nonresident to take place within this State when he cannot be personally served with notice and subpoena."

By subdivision 7 of § 4096, before quoted, an exception was made as to foreign corporations whereby examinations within the State might be ordered and compelled against them regardless of their non-residence and of any inability to obtain service on them in the State. Thus they were subjected to a rule much more onerous than that applicable to non-resident individuals in like situations and also more onerous than that applicable to resident suitors, whether individuals or corporations. The Supreme Court justified this difference in legislative treatment and also the order for an examination in this case on the ground that they amounted to no more than a reasonable exercise of the authority of the State over a non-resident corporation coming voluntarily into the State to seek a remedy in her courts against a resident defendant.

We take a different view of the matter. According to the sworn complaint, to the allegations of which due regard must be had, the automobile belonged to the plaintiff. It had been unlawfully taken from the plaintiff's possession in Kentucky and put in the defendant's possession in Wisconsin. It did not get into the latter State through any act of the plaintiff; nor did the acts by which it got there make it any the less the plaintiff's property. Only by going into that State and there instituting an action of replevin against the wrongful possessor could the plaintiff repossess itself of its property. Unless it took that course its property would be lost. The state court whose aid it invoked was one whose jurisdiction was general and adequate for the purpose. In the cir-

cumstances, the right to bring the action was plain. See *Charter Oak Life Insurance Co.* v. *Sawyer*, 44 Wis. 387; *Chicago Title & Trust Co.* v. *Bashford*, 120 Wis. 281; *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197. To have denied that right would in effect have deprived the plaintiff of its property and have been an intolerable injustice. That the plaintiff owed its corporate existence to Kentucky did not enable Wisconsin to treat its plight with indifference. It was a "person" within the meaning of both the due process clause and the equal protection clause of the Fourteenth Amendment. *Santa Clara County* v. *Southern Pacific R. R. Co.*, 118 U. S. 394, 396; *Covington & Lexington Turnpike Co.* v. *Sandford*, 164 U. S. 578, 592; *Smyth* v. *Ames*, 169 U. S. 466, 522; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Vosburg*, 238 U. S. 56. The latter clause declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws", meaning, of course, the protection of laws applying equally to all in the same situation. The words "within its jurisdiction" are comprehensive, but we have no need for attempting a full definition of them here. It is enough to say that, when the plaintiff went into Wisconsin, as it did, for the obviously lawful purpose of repossessing itself, by a permissible action in her courts, of specific personal property unlawfully taken out of its possession elsewhere and fraudulently carried into that State, it was, in our opinion, within her jurisdiction for all the purposes of that undertaking. See *Southern Ry. Co.* v. *Greene*, 216 U. S. 400; *Blake* v. *McClung*, 172 U. S. 239. And we think there is no tenable ground for regarding it as any less entitled to the equal protection of the laws in that State than an individual would have been in the same circumstances; for, as was held in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, 154, "a State has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

No doubt a corporation of one State seeking relief in the courts of another must conform to the prevailing modes of proceeding in those courts and submit to reasonable rules respecting the payment of costs or giving security therefor and the like (see *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553, 561); but it cannot be subjected, merely because it is such a corporation, to onerous requirements having no reasonable support in that fact and not laid on other suitors in like situations. Here the statute authorized the imposition, and there was imposed, on the plaintiff a highly burdensome requirement because of its corporate origin,—a requirement which under the statute could not be laid on an individual suitor in the same situation. The discrimination was essentially arbitrary. There could be no reason for requiring a corporate resident of Louisville to send its secretary, papers, files and books to Milwaukee for the purposes of an adversary examination that would not apply equally to an individual resident of Louisville in a like case. The discrimination is further illustrated by the provision that as to all residents of Wisconsin, individual and corporate, the examination should be had in the county of their residence, no matter what its distance from the place of suit.

We hold that the statute as it was applied in this case was invalid, and the orders made under it were erroneous, as denying to the plaintiff the equal protection of the laws. This conclusion renders it unnecessary to consider the contention made under the due process clause.

Judgment reversed.

MR. JUSTICE BRANDEIS, dissenting, with whom MR. JUSTICE HOLMES concurs.

To sustain the contention that the statute violates the due process clause, it would be necessary to hold that under no conceivable circumstances could the trial court

have reasonably required the non-resident plaintiff who invoked its process to submit within the State to examination as a witness and to an inspection of relevant books and papers. If the order for examination was legal it was proper to dismiss the suit in case the order was disobeyed. That there may be cases in which oral examination of a plaintiff in the presence of defendant and by counsel familiar with the matter in issue is essential to an adequate presentation of the facts cannot be doubted. If so, it is within the power of a State to require that a plaintiff shall submit to such preliminary examination somewhere. Whether this was a case requiring such examination could be determined properly only upon hearing the parties; and for such hearing opportunity was given by the judge of the trial court. If this was a case in which oral examination and inspection of the documents was essential to an adequate presentation of the matter in controversy, it was necessary, in order to secure it, that either the plaintiff's secretary should go to Milwaukee for examination, or that defendant and counsel should go to Louisville. Whether, under such circumstances, the plaintiff should in fairness be required to come to the place where it instituted suit or the defendants be obliged to go with counsel to the plaintiff's place of residence, was, likewise, a matter which could properly be determined only upon hearing the parties; and this opportunity was given by the judge of the trial court. It cannot be that the due process clause of the Fourteenth Amendment deprives a State of the power to authorize its courts to so mould their process as to secure, in this way, the adequate presentation of a case.

To sustain the contention that the statute denies to plaintiff equal protection of the laws would seem to require the Court to overrule *Blake* v. *McClung*, 172 U. S. 239, 260, 261, and many other cases. The plaintiff, a foreign corporation not doing business within the State

of Wisconsin, was not a person "within its jurisdiction." Moreover, the statutory provision complained of put non-residents substantially upon an equality with residents. Compare *Kane* v. *New Jersey,* 242 U. S. 160, 167. No question of interstate commerce is involved. In my opinion the equal protection clause does not prevent Wisconsin from moulding, in the case of foreign corporations, the details of its judicial procedure to accord with the requirements of justice.